(1)

No. 01-6978-CSY Title: Gary Albert Ewing, Petitioner
v.
California

Docketed: October 23, 2001 Court: Court of Appeal of California, Second Appellate District

Entry	Date	Proceedings and Orders
	Oct 3 2001	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 22, 2001)
	Nov 2 2001	Waiver of right of respondent California to respond filed.
	Dec 6 2001	DISTRIBUTED for Conference of January 4, 2002
	Dec 26 2001	Response requested.
	Jan 24 2002	Brief of respondent California in opposition filed.
	Feb 7 2002	REDISTRIBUTED for Conference of February 22, 2002
	Feb 21 2002	Letter of respondent California filed.
	Mar 13 2002	REDISTRIBUTED for Conference of March 29, 2002
	Apr 1 2002	Petition GRANTED. The case is set for oral argument in tandem with No. 01-1127, Lockyer v. Andrade. SET FOR ARGUMENT November 5, 2002. **********
	Apr 16 2002	Motion of petitioner for appointment of counsel filed.
	Apr 30 2002	Motion DISTRIBUTED. May 16, 2002 (Page 4)
	May 14 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 17, 2002.
	May 20 2002	Motion for appointment of counsel GRANTED and it is ordered that Quin Denvir, Esquire, of Sacramento, California, is appointed to serve as counsel for the petitioner in this case.
	Jun 10 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 1, 2002.
	Jun 28 2002	Joint appendix filed.
	Jun 28 2002	Brief of petitioner Gary Albert Ewing filed.
	Jul 1 2002	Brief amicus curiae of Families Against Mandatory Minimums filed.
	Jul 31 2002	Brief amicus curiae of United States filed.
	Jul 31 2002	Brief amici curiae of Alabama, et al. filed.
	Jul 31 2002	Brief amici curiae of Criminal Justice Legal Foundation, et al. filed.
	Aug 1 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 1 2002	Brief of respondent California filed.
	Aug 1 2002	LODGING consisting of twenty sets of lower court material received from counsel for the respondent.
	Aug 1 2002	Brief amicus curiae of California District Attorneys Association filed.
	Aug 7 2002	Letter of petitioner in response to respondent's lodging.
	Aug 16 2002	Motion of petitioner to strike respondent's lodging of lower court material filed.

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Entry	Date	Proceedings and Orders
	Aug 31 2002	CIRCULATED.
	Sep 3 2002	Respondent's opposition to petitioner's motion to strike lodging of respondent.
	Sep 4 2002	Reply brief of petitioner Gary Albert Ewing filed.
	Sep 10 2002	Petitioner's reply to respondent's response to the motion to strike respondent's lodging.
	Oct 7 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 7 2002	Motion of petitioner to strike respondent's lodging of lower court material DENIED.
	Nov 5 2002	ARGUED.
	Nov 5 2002	Letter from counsel for petitioner received and distributed.

ORIGINAL

No. 01-6978 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

GARY ALBERT EWING

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Gary Albert Ewing, submits his affidavit in support of his motion for leave to proceed in forma pauperis. Petitioner asks for leave to file his Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six, without prepayment of costs and to proceed *in forma pauperis*, under Rules 12.2 and 39 of the U.S. Supreme Court Rules, and 28 U.S.C. section 1915. Petitioner's motion for leave to proceed in forma pauperis was submitted to this Court in a separate document.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the California Court of Appeals, Second Appellate District and the California Supreme Court pursuant to California Penal Code section 1240(a)(1).

Dated: October 18, 2001

Respectfully submitted,

Karyn H. Bucur

Karyn H. Bucur
24881 Alicia Parkway #E193
Laguna Hills, CA., 92653
(949)472-1092
Attorney for Petitioner
by appointment of the
Court of Appeals.

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(10)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

(Form 4)

Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

XXXX

7. *State the persons who rely on your or your spouse for support.*

Name	Relationship	Age

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
For home-mortgage payment (include lot rented for mobile home)	$ N/A	$
Are real-estate taxes included? • Yes • No	$ N/A	$
Is property insurance included? • Yes • No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 11	$
Home maintenance (repairs and upkeep)	$	$
Food	$ 11	$
Clothing	$	$
Laundry and dry-cleaning	$ 11	$
Medical and dental expenses	$ 11	$
Transportation (not including motor vehicle payments)	$ 11	$
Recreation, entertainment, newspapers, magazines, etc.	$ 11	$
Insurance (not deducted from wages or included in mortgage payments)	$ 11	$
Homeowner's or renter's	$ 11	$
Life	$ 11	$
Health	$ 11	$
Motor Vehicle	$ 11	$
Other: N/A -	$ 11	$
Taxes (not deducted from wages or included in mortgage payments) (specify): N/A	$ 11	$
Installment payments	$ 11	$
Motor Vehicle	$ 11	$
Credit card (name):	$ 11	$
Department store (name):	$ 11	$
Other:	$ 11	$
Alimony, maintenance, and support paid to others	$ 11	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 11	$
Other (specify): N/A - 1	$ 11	$
Total monthly expenses	$ 0.	$ 0

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

• Yes • (No) If yes, describe on an attached sheet.

10. *Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?*

• Yes • (No) If yes, how much: $ _____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. *Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*

• Yes • (No) If yes, how much? $ N/A

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

CMF_Vacaville, Mr. Gary Ewing, J-15228, P.O. Box 2000
T-Wing 229, Vacaville, CAL 95696 (state prison)

Your daytime phone number: (_____) _____

Your age: 39 Your years of schooling: _____

Your Social Security number: _____

ORIGINAL

No. 01-6978

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

GARY ALBERT EWING

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT
DIVISION SIX

Law Offices of Karyn H. Bucur
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Attorney for Petitioner under
Appointment by the Court of Appeal

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QUESTION PRESENTED

DOES PETITIONER'S TWENTY-FIVE YEAR TO LIFE PRISON SENTENCE VIOLATE FEDERAL CONSTITUTIONAL PROVISIONS AGAINST CRUEL AND UNSUAL PUNISHMENT BECAUSE HIS SENTENCE IS GROSSLY DISPROPORTIONATE TO THE OFFENSE OF *"STEALING GOLF CLUBS"*?

The petitioner Gary Albert Ewing respectfully prays that a writ of certiorari issue to review the decision issued by California Court of Appeal, Second Appellate District, Division Six. The California Supreme Court denied review.

OPINION BELOW

On April 25, 2001, the Court of Appeals of the State of California, Second Appellate District, Division Six, filed an unpublished decision in People v. Ewing, Case number B143745. A copy of that order is attached hereto as Appendix "1".

Petitioner filed a petition for review in the California Supreme Court and the petition was summarily denied on July 11, 2001. A copy of that order is attached hereto as Appendix "2"

JURISDICTION

On July 11, 2001, the California Supreme Court denied review in this case. (App."2".) The instant Petition for Writ of Certiorari is filed within 90 days of that order. (Rule 13)

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1257 on the ground that his rights under the Eighth Amendment to the United States Constitution were violated.

STATUTES INVOLVED IN THIS CASE

California Penal Code section 17 (b)

§ 17. "Felony," "misdemeanor," and "infraction" distinguished; Reduction of misdemeanors to infractions

(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

California Penal Code section 487(a)

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400), except as provided in subdivision (b).

California Penal Code section 489(b)

Grand theft is punishable as follows:

(b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

California Penal Code § 667 subdivision (b) through (i)

§ 667. Habitual criminals; Enhancement; Exceptions

(a) (1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any

precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the

manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) (A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

California Penal Code section 1170.12

Aggregate and consecutive terms for multiple convictions; Prior conviction as prior felony; Commitment and other enhancements or punishment

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial

sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for the purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a

prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d) (1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

STATEMENT OF THE CASE

On April 10, 2000, petitioner was charged by Information in the State of California with one count of grand theft of personal property and one count of burglary. (CT 25-26.)

The Information further alleged that petitioner suffered four serious or violent prior convictions. (Cal. Pen. Code §§ 1170.12 subd. (a) through (d) and 667 subd. (b) through (i).) (CT 25-26.)

Jury Trial began on June 9, 2000, and concluded on May 14, 2000, when the California jury found petitioner guilty of grand theft of personal property in violation of California Penal Code section 487 subdivison (a) and not guilty of burglary. (CT 36-42, 82-85.)

The trial court sentenced petitioner as a third striker to a total term of twenty-five years to life with possibility of parole. (CT 93.)

Petitioner filed a timely notice of appeal from the judgment of conviction and sentence. (CT 94.) Petitioner argued to the California Court of Appeals that his sentence constitutes cruel and unusual punishment in violation of both federal and state constitutions. Petitioner argued that his sentence is grossly disproportionate to the offense of "stealing golf clubs". In California, the crime is a "wobbler" and the crime could have been sentenced as a misdemeanor.

The California Court of Appeal disagreed and affirmed petitioner's twenty-five years to life sentence for stealing golf clubs. The California Court of Appeals specifically found that Petitioner's sentence did not violate the Eighth Amendment. "Nor does his sentence violate the Eighth Amendment. The United States Supreme Court has "repeatedly upheld recidivism statutes" against contentions that they constitute cruel and unusual punishment. (Appendix "1", p. 7.)

Petitioner timely filed a Petition for Review in the California Supreme Court. Petitioner argued that California Supreme Court should grant review to consider if petitioner's twenty-five years to life sentence for stealing golf clubs violates the Eighth Amendment. On July 11, 2001, the California Supreme Court summarily denied the petition. (Appendix "2").

SUMMARY OF ARGUMENT

Petitioner was sentenced to twenty-five years to life under California's Three Strike Law for stealing golf clubs from a pro shop. The offense could have been sentenced as a misdemeanor and the penalty for grand theft in California does not exceed one year in prison. Petitioner argues that his sentence violates the Eighth Amendment of the United States Constitution because serving twenty-five years to life for stealing golf clubs is cruel and unusual

punishment.

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED IN THIS CASE BECAUSE CALIFORNIA'S THREE STRIKES LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION WHERE THE CRIME IS STEALING GOLF CLUBS AND CAN BE CHARGED AS A MISDEMEANOR

1. Summary of Facts

On March 12, 2000, Mr. Joshua Alpert, was working at the pro golf shop at the Lakes At El Segundo Golf Course in Los Angeles County. (RT 347.) He observed petitioner walk into the shop at approximately 8:00 a.m. (RT 350-351.) Petitioner browsed around for about ten to fifteen minutes. (RT 352.) Petitioner purchased a small bucket of golf balls to use at the driving range. (RT 352.) After he made the purchase, petitioner stayed in the pro shop looking at the golf clubs for another five minutes. (RT 353.) Mr. Alpert never saw petitioner with a golf club. Petitioner told him that he was waiting for a friend to play golf. (RT 365-367.)

Petitioner asked Mr. Alpert where the driving range was located. Mr. Alpert instructed petitioner to go out the door and walk left towards the driving range. (RT 355.) As petitioner was walking out the shop, Mr. Alpert noticed that petitioner was limping and turned right towards

the parking lot. (RT 355.)

Mr. Alpert called 911. (RT 356.) Officer Richard James Haney and his partner responded to the call and drove to the golf course. (RT 382-382.) Officer Haney saw petitioner in the golf course parking lot. Petitioner turned and walked between two parked vehicles. Petitioner was walking with a stiff leg. (RT 386-387.)

Officer Haney got out of his car, walked toward petitioner, and saw petitioner pull three golf clubs out of his pants. (RT 387.) Mr. Alpert identified the golf clubs as belonging to the shop and also identified petitioner. (RT 388.) The golf clubs sell for $399.00 a piece. (RT 363.) Petitioner was placed under arrest. (RT 389.)

2. A Life Sentence For Stealing Golf Clubs Violates the Eighth Amendment of the United States Constitution Because The Life Sentence Is Grossly Disproportionate To the Crime

California has a sentencing scheme, known as the Three Strikes Law, which mandates a sentencing judge to impose a minimum sentence of twenty-five years to life imprisonment if the person has two prior qualifying felony convictions and the present conviction is any "felony".

People v. Superior Court (Romero) 13 Cal. 4th 497, 505 (1996).

In the present case, petitioner received a twenty-five year to life prison sentence pursuant to the California Three Strikes Law for stealing golf clubs. (CT 93.) The crime in this case is known as a "wobbler". A "wobbler" is an offense that could either be classified as either a felony or misdemeanor. The law authorizes trial courts to classify certain offenses at sentencing as a misdemeanor, instead of a felony. (Cal. Pen. Code § 17 subd. (b).)

"Section 17 subdivision (b) authorizes the reduction of "wobbler" offenses—crimes that, in the trial court's discretion, may be sentenced alternately as felonies or misdemeanors—upon imposition of a punishment other than state prison or by declaration as a misdemeanor after a grant of probation." People v. Superior Court (Alvarez), 14 Cal. 4th 968, 974. (1997)

Petitioner was convicted of grand theft in violation of California Penal Code section 487 subdivision (a). California Penal Code section 487 subdivision (a) is a "wobbler" offense and may be sentenced either as a misdemeanor or felony. People v. Douglas, 79 Cal. App. 4th 810, 813. (2000). A punishment for grand theft in California is punishable by imprisonment in a county jail not exceeding one year or in the state prison. Cal. Penal

Code § 489. Petitioner's prior convictions or "strikes" stemmed from four convictions of robbery and burglary from a single case. Petitioner was convicted of these four convictions on March 8, 1994. (CT 26.)

The Eighth Amendment of the United States Constitution prohibits infliction of cruel and unusual punishment. Under the United States Constitution, the issue is whether or not the sentence is "grossly disproportionate" to the crime. Harmelin v. Michigan 501 U.S. 957, 1001, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991).

The Supreme Court has "repeatedly emphasized that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense is not to be viewed as–[an] additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." Riggs v. California 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 789, citing Witte v. United States, 515 U.S. 389, 400.) In this case, twenty-five years to life for stealing golf clubs cannot be justified as a "stiffened penalty" for stealing golf clubs because the actual punishment for the crime does not exceed one year in prison. Cal. Pen. Code section 489.

There are situations when the Three Strikes Law provides appropriate sentences: Sentences under the Three

Strikes Law have been held not to constitute cruel and unusual punishment when the defendants have adopted a criminal life style and have demonstrated no intention to function as a responsible member of the community. People v. Cortez, 73 Cal. App. 4th 276, 285 (1999). In Cortez, the court found that Cortez' twenty-five year to life sentence did not constitute cruel or unusual punishment because he had a history of violent conduct and that he is a threat and danger to the welfare of the community. (Id.)

In the instant case, the trial court found that petitioner, who was recently released on parole, did not pose a threat to commit violent crimes, but only posed a threat to commit theft offenses. (RT 1510.)

Unlike the petitioner in Cortez, the appellant in this case has demonstrated he has the intention of becoming drug free for the remainder of whatever life he has left and intends to function as responsible member of the community by participating as an Aids advocate. (RT 1505-1508.) In addition, the sentence of twenty-five years to life is cruel and unusual punishment for a person who is seriously ill and does not expect to live very long because he stole golf clubs.

"The United States Supreme Court has declared that the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power

to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." People v. Deloza 18 Cal. 4th 585, 601 (1998). Petitioner's sentence is not within the limits of civilized standards for the offense he committed.

Several justices of this Court expressed interest in the constitutionality of California Three-Strikes Law: Justice Souter, in a dissent wrote, "Two terms ago this Court denied certiorari in Riggs v. California, 525 U.S. 1114, 142 L. Ed. 789, 119 S. Ct. 890 (1999). The issue was an Eighth Amendment challenge to California's statutory scheme that allows a petty theft (normally a misdemeanor) to be counted as a third felony for purposes of a three-strikes law, resulting in a sentence of 25 years to life. This case raises the same issue; the value of the goods taken was $43.00. Justice Breyer dissented from the denial of certiorari in Riggs while Justice Stephens filed an opinion respecting the denial, in which Justice Ginsburg and I joined. A principal reason that the three of us were led to concur in the denial of review was the expectation that rulings by other courts on challenges to the California scheme would be valuable to us in any examination of the issue we might ultimately give it. I no longer think this is a sufficient reason to postpone what I assume will inevitably be a decision at some point to examine the

matter—On these facts, I would wait no longer. The issue is serious, the state courts have had adequate opportunity to consider it, and the stakes are substantial." (Stanley Durden v. California, (2001) 121 S. Ct. 1183, 148 L. Ed. 2d. 1027)

Petitioner asked the California Supreme Court to take his case and decide the constitutionality of the Three Strikes Law. The California Supreme Court declined. Petitioner now asks this Court to take his case and decide whether or not people convicted in California for misdemeanor type crimes should spent the rest of their lives in prison.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: October 2, 2001

Respectfully submitted,

Karyn H Bucur

Karyn H. Bucur
Attorney for Petitioner

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY ALBERT EWING,

Defendant and Appellant.

2d Crim. No. B143745
(Super. Ct. No. YAO43550)
(Los Angeles County)

COURT OF APPEAL-SECOND DIST.
FILED
APR 25 2001
JOSEPH A. LANE, Clerk
Deputy Clerk

A jury found Gary Albert Ewing guilty of grand theft and acquitted him of burglary. The trial court found he had suffered four prior serious or violent felony convictions within the *meaning of* California's Three Strikes law. The court declined to reduce the grand theft charge to a misdemeanor or strike any of his prior "strike" convictions and sentenced him to 25 years to life in prison. (Pen. Code, §§ 17, subd. (b) (hereafter section 17(b)); 667, subds. (b)-(i); 1170.12.)[1]

Appellant contends the trial court abused its discretion in refusing to reduce his current "wobbler" conviction to a misdemeanor and strike his prior convictions. He also challenges the sufficiency of the evidence to support the court's

[1] All statutory references are to the Penal Code.

Appendix "1" (23)

finding that he was the person who suffered the prior strike convictions. We reject his contentions and affirm.

FACTS

In March of 2000, an employee of the pro golf shop at the El Segundo Golf Course observed appellant enter the shop, look at golf clubs for 10 to 15 minutes, and purchase a small bucket of balls to use on the driving range. Appellant asked for directions to the driving range and walked back to the golf clubs. There were other customers in the shop during this time.

The employee observed that appellant was "noticeably limping" when he walked out of the shop and, instead of walking in the direction of the driving range, he walked toward the parking lot. Realizing that appellant looked "totally out of place," the employee called 911.

Officer Richard Haney of the El Segundo Police Department arrived and saw appellant walking stiff legged between two parked vehicles. He saw appellant pull three golf clubs out of his pants and arrested him. The employee testified the clubs were Calloway golf clubs priced at $399 each, they had the shop's identification number on them, appellant had not paid for them, and he did not have permission to take them out of the store.

The Motion to Reduce the Wobbler Offense to a Felony

In a bifurcated proceeding, the prosecution presented evidence that appellant had previously been convicted in 1993 of first degree robbery and three separate residential burglaries, all serious or violent felonies under the Three Strikes law.

At sentencing, defense counsel orally moved the court to reduce the current grand theft conviction to a misdemeanor pursuant to section 17(b) and to strike "an appropriate number" of his prior convictions. His counsel observed that, of his four prior serious felony convictions, two were nonviolent, appellant was 38 years old, and his health problems would minimize the chance of future criminal activity (he was ill

(24)

with AIDS and blind in one eye). Defense counsel argued his theft-related offenses were drug related and he had not received assistance for his drug problem. The prosecution countered that appellant had suffered 10 convictions and had repeatedly failed at probation and parole.

The trial court did not make an express ruling on the section 17(b) motion but expressly declined to strike any of his prior convictions, reasoning that he was not outside the spirit and intent of the Three Strikes law. The court noted appellant had suffered nine convictions, some of which were misdemeanors, from 1988 through 1993 when he was imprisoned for the robbery and burglary offenses. He was released on parole in June of 1999 and committed the current offense in March 2000, nine months later. The court concluded appellant was a threat to the community based on his recidivism for theft-related offenses. The court imposed the mandatory 25-years-to-life sentence, but struck a prior prison term allegation to eliminate a one-year enhancement under section 667.5.

Appellant first contends the trial court failed to exercise its discretion in ruling on his section 17(b) motion because it made no express findings or rulings on the matter. We disagree. The court impliedly denied appellant's section 17(b) motion when it declined to strike his prior strike convictions.

Alternatively, appellant argues the court abused its discretion in denying the section 17(b) motion by focusing solely on appellant's criminal history and failing to consider other relevant factors. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978-981 (hereafter *Alvarez*) [discussing sentencing considerations in reducing wobbler to misdemeanor].) We reject this contention.

First, the People correctly observe that appellant has waived his right to challenge the denial of his 17(b) motion on this ground. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the California Supreme Court held that the waiver doctrine should apply to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices . . . [including] . . . cases in which the court purportedly

erred because it . . . misweighed the various [sentencing] factors, or failed to state any reasons or give a sufficient number of valid reasons." The court observed that routine defects in the trial court's statement of reasons are easily prevented and corrected if called to the trial court's attention. (*Ibid.*) Here, had appellant's counsel told the trial court that it should consider various factors other than appellant's criminal history, the trial court could have commented upon such other factors or observed that it had already taken them into account in deciding the motion.

Second, we presume the trial court considered all relevant sentencing criteria in denying the motion unless the record affirmatively demonstrates otherwise. (*Alvarez*, *supra*, 14 Cal.4th at p. 977 ["trial court is presumed to have acted to achieve legitimate sentencing objectives"]; *People v. Kelley* (1997) 52 Cal.App.4th 568, 582.) The record here does not indicate otherwise. Although appellant claims the trial court failed to consider various factors relating to his background (the nonviolent nature of the current offense, his illness, his desire to help the community by participating as an AIDS advocate, and his willingness to enter a drug rehabilitation program), the court heard appellant's arguments, stated it had reviewed appellant's file carefully, and found appellant posed a threat to public safety.

Third, the court acted well within its discretion in treating appellant's offense as a felony. The trial court possesses broad discretion to reduce a wobbler to a misdemeanor pursuant to section 17(b). (*Alvarez*, *supra*, 14 Cal.4th at p. 977.) In exercising this discretion, the court should examine the nature and circumstances of the offense, defendant's attitude toward the offense, defendant's behavior in court, and the general sentencing objectives of California Rules of Court, rule 410. Appellant bears the burden of establishing that his sentence was unreasonable. We do not substitute our judgment for that of the trial court; our standard of review is "extremely deferential and restrained." (*Id.* at pp. 977-778, 981.)

The trial court recognized the current offense was not violent, but noted appellant had been convicted of nine offenses (all but one theft-related) in a five-year

period from 1988 through 1993 and committed the current theft while on parole less than a year after being released from prison. There was no abuse of discretion.

Refusal to Strike the Prior Convictions

Appellant next contends the trial court abused its discretion by refusing to strike one or more of his prior serious felony convictions. We disagree.

Trial courts have limited discretion under section 1385 to strike prior conviction allegations in Three Strikes cases. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) The trial court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes sentencing] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The trial court should also consider the general sentencing objectives under California Rules of Court, rule 410. (*Alvarez, supra,* 14 Cal.4th at p. 978.)

Trial court rulings on *Romero* motions are reviewed under the deferential abuse of discretion standard. (*Alvarez, supra,* 14 Cal.4th at pp. 976-978.) Under that standard, a defendant who seeks reversal must demonstrate the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of the prior convictions. (*Ibid.*; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)[2]

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[2] We reject the People's contention that, pursuant to *People v. Benevides* (1998) 64 Cal.App.4th 728, the denial of a *Romero* motion may not be reviewed on appeal. Though certain language in *Benevides* suggests an abridgment of the defendant's right to appeal, the Court of Appeal modified its opinion on rehearing and clarified, "We do not hold a defendant may not appeal or that a defendant lacks standing to appeal the issue. Rather, we conclude that trial court error for failure to exercise its section 1385

(Fn. cont'd.)

Here, the trial court's sentencing decision was not irrational or arbitrary. Appellant has a lengthy criminal record dating back to 1984, with numerous misdemeanor and felony convictions. The record includes convictions for theft, battery, possession of a firearm, robbery, and burglary. Two of his prior strike convictions were violent and involved the use of a weapon. Appellant's rehabilitative prospects are bleak. He has continuously been on either probation or parole since 1988 and committed the current offense after being released for only nine months. The probation report found no circumstances in mitigation. Given appellant's prior convictions, background, and rehabilitative prospects, the trial court did not abuse its discretion in concluding that appellant was within the spirit of the Three Strikes law and denying his motion.

Cruel and Unusual Punishment

We also reject appellant's contention that his sentence constitutes cruel and unusual punishment in violation of both the federal and state constitutions. He argues his sentence is grossly disproportionate to the offense of "stealing golf clubs." We disagree.

Under our state Constitution, the issue is whether the 25-years-to-life sentence is so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441.) Under *Lynch*, three factors are critical: (1) the nature of the offense and offender, (2) the sentence compared to sentences for more serious offenses in California, and (3) the sentence compared to sentences for the same offense in other states. (*Lynch*, at pp. 425-427.)

(Fn. cont'd.)

discretion must be affirmatively shown by the record." (*Id.* at p. 733, fn. 6; see also *People v. Myers, supra,* 69 Cal.App.4th at p. 309 [rejecting same contention].)

Appellant's sentence is constitutional under *Lynch*. As discussed above, the sentence is reasonably proportional to the offense and offender. The severity of the sentence was properly affected by his prior convictions under the Three Strikes law, a general recidivist history, and dim prospects for the future. Also, his sentence conforms to sentences for repeat offenders under the Three Strikes law and, although he does not address the issue, it is also constitutionally proportional to sentences for repeat offenders in other states. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1509-1516.) Numerous cases have held that severe sentences under the Three Strikes law do not constitute cruel and unusual punishment under the federal or state constitutions. Cases upholding 25-years-to-life (or more) sentences for arguably minor offenses committed after two or three prior strike convictions include *Martinez*, *supra*, *People v. Goodwin* (1997) 59 Cal.App.4th 1084 and *People v. Cooper* (1996) 43 Cal.App.4th 815.

Nor does his sentence violate the Eighth Amendment. The United States Supreme Court has "repeatedly upheld recidivism statutes" against contentions that they constitute cruel and unusual punishment. (*Parke v. Raley* (1992) 506 U.S. 20, 27.) In *Rummel v. Estelle* (1980) 445 U.S. 263, for example, the Supreme Court upheld the mandatory life sentence, under a Texas recidivist statute, of a defendant convicted of obtaining $120.75 by false pretenses with two prior felony convictions involving nonviolent petty thefts. The court observed that the sentence under a recidivist statute is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." (*Id.* at p. 284.) Such a statute serves the legitimate goal of deterring "repeat offenders" and of segregating the recidivist "from the rest of society for an extended period of time." (*Ibid.*) Just as there was no Eighth Amendment violation in the mandatory life sentence imposed for the nonviolent petty offenses in *Rummel*, by analogy appellant's 25-years-to-life sentence is not cruel and unusual. Appellant's sentence was justified because of his recidivism.

Evidence of the Prior Convictions

The evidence offered by the prosecution as proof that appellant had suffered four prior serious or violent felony convictions consisted of a section 969b packet containing a certification letter from the Department of Corrections, a copy of appellant's chronolo l movement history, an abstract of judgment from case No. NA018343, a fingerprint card with appellant's physical description and identifying information, and a small booking photograph of "Ewing, G.," "J15228," dated April 18, 1998. All of the pages in the packet had appellant's name on them, as well as the identical CDC No. "J15228."

Defense counsel objected to the receipt of the certified exhibit on lack of foundation and hearsay grounds, arguing the prosecution had not established beyond a reasonable doubt that appellant was the person who suffered the prior convictions listed on the abstract of judgment. Defense counsel noted the prosecution had not matched the fingerprints in the certified packet to appellant's fingerprints and that, at a minimum, a fingerprint expert should confirm the identification.

The prosecution argued the court could decide whether the photograph in the packet appeared to depict appellant and consider the name on the documents to establish that appellant was the person who suffered the prior convictions. The trial court reviewed the photograph and packet and determined that appellant was the person who suffered the prior convictions.

Appellant contends the evidence was insufficient to identify him as the person who suffered the prior convictions. In ruling on a substantial evidence challenge, we review the entire record "in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) A certified record from a correctional institution constitutes prima facie proof that a prior conviction was suffered. (§ 969b.) Further, it "has long . . . been the

rule in California, in the absence of countervailing evidence, that identity of person may be presumed, or inferred, from identity of name." (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401; *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 805-806.)

Here, as the People observed, the trial court was able to compare the booking photograph with the physical description on the fingerprint card, including hair color, eye color, age, height, and weight, with appellant who was present in court. Each page of the packet contained appellant's name and identical CDC number for Gary Albert Ewing (J15228). This evidence as a whole satisfied the prosecution's burden of proof. Appellant's contention is without merit.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Deanne Myers, Judge

Superior Court County of Los Angeles

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Robert F. Katz and Karla Cottis, Deputy Attorneys General, for Plaintiff and Respondent.

Court of Appeal, Second Appellate District, Division Six - No. B143745
S098041

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

GARY ALBERT EWING, Defendant and Appellant.

SUPREME COURT
FILED
JUL 11 2001
Frederick K. Ohlrich Clerk
DEPUTY

Petition for review DENIED.
Werdegar J., was absent and did not participate.

GEORGE
Chief Justice

Appendix "2"
(33)

(40)

No. 01-6978 (3)

JAN 25 2002

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GARY A. EWING, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does Petitioner's twenty-five year to life prison sentence violate the Cruel and Unusual Punishment Clause when Petitioner was convicted of grand theft, and his prior criminal history includes two violent felonies involving the use of a weapon, and two other serious felonies?

BEST AVAILABLE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-6978

GARY A. EWING, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

OPINION OR JUDGMENT BELOW

Petitioner, Gary A. Ewing, seeks review of the judgment of the Court of Appeal of California, Second Appellate District in *People v. Ewing* (B143745), affirming his judgment of conviction. A copy of the court of appeal's opinion is attached as Appendix 1 to Petitioner's Petition for Writ of Certiorari. The California Supreme Court denied Petitioner's petition for review. A copy of the California Supreme Court's order is attached as Appendix 2 to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Following a jury trial in the Los Angeles County Superior Court, Petitioner was convicted of grand theft of

personal property.[1] Cal. Penal Code § 487(a). Petitioner waived his right to a jury trial regarding the prior conviction allegations. The trial court subsequently found that Petitioner had been convicted of one count of robbery, Cal. Penal Code § 211, and three counts of residential burglary, Cal. Penal Code § 459. The trial court found all four prior convictions were "strikes" within the meaning of California's Three Strikes Law, Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d). The trial court also found true a prior prison term allegation, Cal. Penal Code § 667.5, regarding Petitioner's robbery conviction. (Petition, Appendix 1 (Opinion at 1).)

At sentencing, the trial court denied Petitioner's request to have his present conviction reduced to a misdemeanor, Cal. Penal Code § 17(b), and his request to dismiss his "strike" offenses in furtherance of justice, Cal. Penal Code § 1385. However, the trial court, in furtherance of justice, dismissed the one-year sentence enhancement for the prior prison term allegation. Pursuant to California's Three Strikes Law, Petitioner was sentenced to twenty-five years to life in state prison. (Petition, Appendix 1 (Opinion at 1-2).)

The California Court of Appeal, Second Appellate District, affirmed the judgment of the superior court. The court of appeal specifically found that: (1) the trial court properly acted within its discretion in refusing to reduce Petitioner's current offense to a misdemeanor; (2) the trial court properly acted within its discretion in refusing to dismiss the "strike" convictions in furtherance of justice; (3) Petitioner's sentence did not violate the federal and state prohibitions against cruel and/or unusual punishment; and there was sufficient evidence of Petitioner's prior convictions. (Petition, Appendix 1 (Opinion at 2-9).)

Petitioner filed a petition for review in the California Supreme Court arguing that his sentence violated the Eighth Amendment of the United States Constitution. The California

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1. The jury acquitted Petitioner of a charge of burglary. Cal. Penal Code § 459.

Supreme Court denied the petition for review. (Petition, Appendix 2.)

Petitioner filed his instant Petition for Writ of Certiorari in this Court on or about October 2, 2001.

STATEMENT OF FACTS

In March of 2000, Petitioner entered the Pro Shop at the El Segundo Golf Course located in El Segundo, California. He purchased a small bucket of golf balls to use at the course driving range, and looked at the golf clubs in the shop. As Petitioner subsequently exited the shop, a shop employee noticed Petitioner walking to the parking lot rather than the driving range. Petitioner also was limping. The employee called 911. A police officer thereafter saw Petitioner in the parking lot of the golf course. Petitioner withdrew three Calloway golf clubs from his pants. The police officer subsequently apprehended Petitioner. The shop employee later identified Petitioner as the person who limped from the shop, and he identified the clubs as belonging to the shop. Petitioner had not paid for the clubs and was not given permission to take the clubs. Each club was priced at $399. (Petition, Appendix 1 (Opinion at 2).)

SUMMARY OF REASON FOR DENYING PETITION

The instant Petition fails to raise an important and unsettled question of federal law because, in light of Petitioner's current offense and criminal history which includes two violent felonies which involved the use of a weapon, and two other serious felonies, Petitioner's current sentence of twenty-five years to life in state prison is not cruel and unusual punishment under the Eighth Amendment.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE A PRISON SENTENCE OF TWENTY-FIVE YEARS TO LIFE FOR PETITIONER'S CURRENT OFFENSE AND HIS VIOLENT AND SERIOUS PRIOR CONVICTIONS IS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

Petitioner contends that certiorari should be granted because the California Court of Appeal incorrectly found that Petitioner's sentence comported with the Eighth Amendment. (Pet. at 16-22.) Supreme Court Rule 10(b)(c) provides that a petition for writ of certiorari will be granted only for "compelling reasons" such as when a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals;" or when a state court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." In light of Petitioner's present offense and his substantial recidivism, the California Court of Appeal's rejection of Petitioner's Eighth Amendment claim does not conflict with the decisions of this Court or the Ninth Circuit Court of Appeals. Moreover, the case fails to present a question of federal law requiring settlement by this Court. Thus, the Petition should be denied.

A. The Evolution Of This Court's Recent Eighth Amendment Jurisprudence

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. The Eighth Amendment applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666 (1962). Starting in 1980, this Court has issued several decisions defining the proper scope of Eighth Amendment review of noncapital prison sentences.

In the first of these cases, *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court gave the Eighth Amendment its narrowest construction. The petitioner in *Rummel* was convicted of obtaining $120.75 by false pretenses. He had two prior non-violent convictions. Pursuant to the state's recidivist law, the trial court sentenced the petitioner to life imprisonment with the possibility of parole. This Court found that the sentence did not violate the Eighth Amendment. *Id.* at 265-66, 285.

The *Rummel* Court found that "on occasion" this Court has "stated that the Eighth Amendment prohibits imposition of a sentence that it grossly disproportionate to the severity of the crime." *Rummel*, 445 U.S. at 272. However, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 272-73.

The *Rummel* Court found one example where this Court reviewed a non-capital sentence for proportionality. *Rummel*, 445 U.S. at 275. In *Weems v. United States*, 217 U.S. 349 (1910),[2] this Court found that because the petitioner was convicted of a relatively minor offense, the mode of his punishment, constant hard and painful physical labor, violated the Cruel and Unusual Punishment Clause. *Id.* at 357-82; *see Rummel*, 445 U.S. at 272-74.

This Court, in *Rummel*, was reluctant to, and refused to, review whether the length of the recidivist prison sentence

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2. *Weems* was the first case where this Court was called upon to define what constitutes a cruel and unusual punishment. *Weems*, 217 U.S. at 368-69.

imposed was disproportional. *Rummel*, 445 U.S. at 274.[3] Recognizing that Eighth Amendment review must be objective rather than subjective, *id.* at 275 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)), the *Rummel* Court found that in *Weems* it was possible to objectively review whether the mode of punishment was cruel and unusual in comparison to other punishments that have been imposed historically. However, "a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal" would lead to an impermissible subjective review. *Rummel*, 445 U.S. at 275. This Court, in *Rummel*, specifically rejected the petitioner's argument that objective proportionality review could occur by analyzing factors such as the defendant's lack of violence, the amount of property taken, and an inter-jurisdictional comparison of sentences for similar offenses. *Id.* at 275-82.

Two years after deciding *Rummel*, this Court reaffirmed *Rummel's* narrow construction of the Eighth Amendment in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam). The petitioner in *Hutto* was convicted of possession of nine ounces of marijuana with intent to distribute and distribution of marijuana. The trial court sentenced the petitioner to two consecutive terms of twenty years

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3. In reference to the proportionality review conducted in *Weems*, the *Rummel* Court stated:

> Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel, 445 U.S. at 274.

imprisonment. This Court found that the sentence did not violate the Eighth Amendment. *Id.* at 370-72.

This Court, in *Hutto*, severely chastised the lower court for conducting a proportionality review of the prison sentence by applying four factors[4] that had been disapproved in *Rummel*. *Hutto*, 454 U.S. at 372-73 (citing *Rummel*, 445 U.S. at 275-76). The *Hutto* Court stated that the lower court "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress." The *Hutto* Court further stated that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto*, 454 U.S. at 374-75.

One year after deciding *Hutto*, this Court turned significantly away from its narrow construction of the Eighth Amendment. In *Solem v. Helm*, 463 U.S. 277 (1983), the petitioner was convicted of uttering a "no account" check for $100. The petitioner's six prior convictions were non-violent. He was sentenced to life imprisonment without the possibility of parole. This Court found that the petitioner's sentence was disproportionate to his offense. *Id.* at 279-303.

Despite this Court's holding in *Rummel*, the *Solem* Court approved proportionality review of prison sentences and mandated consideration of "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292. The list of three mandatory factors was "by no means exhaustive." *Id.* at 294.

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4. The factors considered by the lower court were the element of violence in the offense, the purpose behind the state's sentencing law, an inter-jurisdictional comparison of sentences for the crime, and a comparison of the sentence with punishments for other offenses in the state. *Hutto*, 454 U.S. at 373 n.2.

Although the three mandatory factors had been rejected by the *Rummel* Court as leading to a subjective review of prison terms, *Rummel*, 445 U.S. at 275-82; *see Hutto*, 454 U.S. at 372-75, the *Solem* Court found that the test was "not inconsistent with *Rummel v. Estelle*." *Solem*, 463 U.S. at 303 n.32.

Seven years after deciding *Solem*, this Court retreated from *Solem*'s liberal construction of the Eighth Amendment. In *Harmelin v. Michigan*, 501 U.S. 957 (1990), the petitioner was convicted of possession of 672 grams of cocaine and sentenced to life imprisonment without the possibility of parole. Five justices found that the petitioner's sentence did not violate the Cruel and Unusual Punishment Clause. *Id.* at 961-1009.

In *Harmelin*, this Court continued its ongoing debate over the proper scope of Eighth Amendment review. Justice Scalia found that the Eighth Amendment was not intended to guarantee proportionality of prison terms. *Id.* at 965-85. Furthermore, he found that proportionality review is unworkable because "[w]hile there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are 'cruel and unusual,' *proportionality* does not lend itself to such analysis." *Id.* at 985 (original emphasis). Justice Scalia specifically found that the *Solem* proportionality test was impractical because application of its factors results in a subjective review of the sentence. Consequently, he found it necessary to overrule *Solem*. *Id.* at 985-90.

In sharp contrast, Justice White found historical precedent for a proportionality guarantee in the Eighth Amendment. *Harmelin*, 501 U.S. at 1009-15 (White, J., dissenting). Contrary to Justice Scalia's position regarding the impracticality of proportionality review, Justice White found that courts "appear to have had little difficulty" reviewing the length of a given sentence. *Id.* at 1015. Justice White also found that Justice Scalia failed to provide a "mechanism for addressing a situation" where a significantly long prison sentence is imposed for a very minor criminal offense. *Id.* at 1018. As for *Solem*, Justice White believed the three mandatory

factors set forth therein were practical and workable. Consequently, Justice White found "no justification for overruling or limiting *Solem*." *Id.* at 1021.

Striking a middle ground, Justice Kennedy bypassed the historical debate and found that the Eighth Amendment contained a "narrow proportionality principle." *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring) ("Regardless of whether Justice Scalia or Justice White has the best of the historical argument, [citations], *stare decisis* counsels our adherence to the narrow proportionality principles that has existed in our Eighth Amendment jurisprudence for 80 years"). Justice Kennedy recognized that the "precise contours" of the proportionality principle "are unclear." *Id.* at 998. The Eighth Amendment, however, "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001 (quoting *Solem*, 463 U.S. at 288, 303).

Attempting to resolve the inconsistency caused by the *Solem*, *Hutto*, and *Rummel* decisions, Justice Kennedy articulated a new proportionality test. First, the reviewing court should perform a "threshold comparison" of the crime committed and the sentence imposed to determine if there is an inference of gross disproportionality. Only when such an inference arises, however, may the reviewing court engage in an inter-jurisdictional comparative analysis. *Harmelin*, 501 U.S. at 1004-05. Justice Kennedy found that such a test "neither 'eviscerate[s]' *Solem*, nor 'abandons[s]' its second and third factors, . . . and it takes full account of *Rummel* and [*Hutto*]." *Id.* at 1005. Because only Justices O'Connor and Souter joined Justice Kennedy's concurrence, *id.* at 996, his test was not accepted by a majority of this Court.

Since deciding *Harmelin*, this Court has twice denied petitions for writ of certiorari where the petitioner sought review of whether California's Three Strikes Law violates the Eighth Amendment. In the first of these cases, *Riggs v. California*, 525 U.S. 1114, 119 S. Ct. 890 (1999), the petitioner was convicted of petty theft with a prior conviction. The petitioner also had at

least two prior "strike" offenses under California's Three Strikes Law.[5] The petitioner was sentenced to twenty-five years to life in state prison. Had the petty theft offense been the petitioner's first offense, his sentence would have been no more than six months in county jail. 119 S. Ct. at 891.

Justice Breyer dissented from the denial of certiorari in *Riggs*. *Riggs*, 119 S. Ct. at 892 (Breyer, J., dissenting). Justice Stevens, with Justices Souter and Ginsberg concurring, stated that the case raised a "serious question concerning application of California's 'three strikes' law [citation] to petty offenses." *Id.* at 891. Certiorari was not yet necessary because "[n]either the California Supreme Court nor any federal tribunal ha[d] yet addressed the question." *Id.*

In the second case, *Durden v. California*, 531 U.S. 1184, 121 S. Ct. 1183 (2001), the petitioner also was convicted of petty theft and sentenced under California's Three Strikes Law to twenty-five years to life in prison. Justice Souter, with Justice Breyer concurring, dissented from the denial of certiorari, stating that the Eighth Amendment issues presented by California's Three Strikes Law were "substantial." Moreover, Justice Souter also believed that there is no longer good reason to postpone review of California's sentencing scheme because, in the two years following *Riggs*, the California Supreme Court and the Ninth Circuit Court of Appeals still had not yet reviewed the constitutionality of California's Three Strikes Law. 121 S. Ct. at 1183 (Souter, J., dissenting).

Although the California Supreme Court still has not yet granted review to consider whether California's Three Strikes Law comports with this Court's Eighth Amendment decisions, the Ninth Circuit recently addressed the issue on habeas corpus in *Andrade v. Attorney General of the State of*

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5. Only specific serious or violent felonies can be "strikes" under California's Three Strikes Law. Cal. Penal Code §§ 1170.12(b)(1), 667(d)(1); *see* Cal. Penal Code §§ 667.5(c) (violent felonies), 1192.7 (serious felonies).

California, 270 F.3d 743 (9th Cir. 2001).[6] The petitioner in *Andrade* was convicted of two counts of petty theft with a prior offense. The petitioner had five prior felony convictions, including three prior residential burglary convictions, and two prior misdemeanor convictions. The petitioner was sentenced to twenty-five years to life in prison for each count of petty theft, for a total of fifty years to life in prison. *Id.* at 748-49.

Because *Andrade* arose on federal habeas, the Ninth Circuit was required to apply the standard of review set forth in the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-32, 110 Stat. 1214 (Apr. 24, 1996) (hereinafter the "AEDPA"). Consequently, the petitioner was entitled to habeas corpus relief for his Eighth Amendment claim only if the state court decision denying relief was "contrary to, or involve[d] an unreasonable application of, clearly established federal law as determined by" this Court. *Andrade*, 270 F.3d at 753 (quoting 28 U.S.C. § 2254(d)(1)).

The Ninth Circuit, in *Andrade*, reviewed this Court's decisions in *Rummel*, *Solem*, and *Harmelin* to determine this Court's "clearly established" principles regarding the Eighth Amendment. *Id.* at 754-58. The *Andrade* court found that, although *Rummel* and *Solem* remained good law after *Harmelin*, the proper scope of Eighth Amendment review of a prison sentence was stated in Justice Kennedy's plurality opinion in *Harmelin*. *Andrade*, 270 F.3d at 758, 766. The Ninth Circuit found support for its conclusion from the decisions of other lower federal courts. *Id.* at 754, 757 (citing cases). Applying Justice Kennedy's proportionality test, the Ninth Circuit found that the petitioner's sentence was grossly disproportionate to his petty theft offenses and therefore in violation of the Eighth Amendment. *Id.* at 758-66.

One judge dissented in *Andrade*, finding that in applying Justice Kennedy's proportionality test, the majority

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6. Counsel for Respondent has been informed that The Office of the California Attorney General will be filing a petition for writ of certiorari in this Court in *Andrade*.

engaged in an improper subjective evaluation of California's Three Strikes Law. *Id.* at 767-70 (Sneed, J., dissenting).[7] Judge Sneed also noted that "[i]n the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds." *Id.* at 770-71 (citing cases). He concluded that, because of the petitioner's substantial recidivism, the state court denial of petitioner's Eighth Amendment claim did not violate this Court's precedent. *Id.* at 771-72.

Thus, it appears that under the "current state" of this Court's Eighth Amendment cases, proportionality review of a prison sentence is proper. *Solem*, 463 U.S. at 284; *see Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring); *id.* at 1013 (White, J., dissenting); *id.* at 1028 (Marshall, J., dissenting). However, the test for proportionality is not clearly established. The Ninth Circuit, and apparently other lower federal courts, have applied Justice Kennedy's test from *Harmelin* even though his opinion was not approved by a majority of this Court. *Andrade*, 270 F.3d at 754-66; *see Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring).

The test formulated by Justice Kennedy applies the same factors used in *Solem*, but contrary to *Solem*, analysis of all of the factors is not mandatory. *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring); *see Solem*, 463 U.S. at 292. As noted by Justice White in *Harmelin*, Justice Kennedy's test "eviscerate[s]" the *Solem* test, "leaving only an empty shell." *Harmelin*, 501 U.S. at 1018 (White, J., dissenting). Further clouding the state of the law is Justice Kennedy's statement that his test does not eviscerate or abandon the *Solem* test, and "takes full account" of *Rummel* and *Hutto*. *Id.* at 1005 (Kennedy, J., concurring).

Although the lack of clarity in this Court's Eighth Amendment precedent may present an important question of

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7. Judge Sneed concurred with the majority that the petitioner filed a timely notice of appeal. *Andrade*, 270 F.3d at 767.

federal law, certiorari is not necessary in this case. This case arises on direct appeal rather than on collateral review. Therefore, this Court would not have to address, as did the *Andrade* court, the apparent inconsistencies in *Rummel*, *Hutto*, *Solem*, and *Harmelin* and decide what has been the "clearly established" federal law regarding the Cruel and Unusual Punishment Clause before the California Court of Appeal affirmed Petitioner's conviction and sentence. 28 U.S.C. § 2254(d)(1). Moreover, as set forth below, Petitioner's sentence was not grossly disproportional to his current offense and criminal history regardless of which Eighth Amendment test is applied. Therefore, certiorari should be denied on this basis as well.

B. A Prison Sentence Of Twenty-Five Years To Life Is Not Disproportionate To Petitioner's Current Offense And Prior Serious And Violent Felony Convictions

Under California law, grand theft can be charged as either a felony or a misdemeanor. Cal. Penal Code §§ 484(a), 487; *see* Cal. Penal Code §§ 17(b), 489(b). Because Petitioner committed his current offense, grand theft, in a non-violent manner, his current offense is somewhat similar to the offenses committed by the petitioners in *Rummel*, *Hutto*, *Solem*, *Harmelin*, and *Andrade*.

Petitioner's criminal history, however, is distinguishable from those of the petitioners in *Rummel*, *Hutto*, *Solem*, *Harmelin*, and *Andrade* because Petitioner has two prior serious felony convictions and two prior violent felony convictions. The trial court found that between 1988 and 1993 Petitioner had nine prior convictions including a prior robbery conviction and three prior residential burglary convictions. The robbery and the residential burglary convictions were found to be "strike" offenses, and Petitioner was found to have used a

weapon in committing two of these "strike" offenses.[8] Up until the present life sentence, nothing deterred Petitioner from continuing his life of crime. (Petition, Appendix 1 (Opinion at 1-3, 6).)

The trial court denied Petitioner's request to reduce the current offense to a misdemeanor,[9] and refused to dismiss Petitioner's prior "strike" offenses in furtherance of justice.[10] (Petition, Appendix 1 (Opinion at 2-6).) Had either request been granted, Petitioner would have received a misdemeanor sentence, or a non-life felony sentence.

Petitioner was thirty-eight years old at sentencing. (Petition, Appendix 1 (Opinion at 2).) Consequently, he will be eligible for parole in 2025, when he is approximately sixty-three years old. Although Petitioner may be entitled to prison conduct credit, he must serve a minimum of 25 years before he is eligible for parole. *In re Cervera*, 24 Cal. 4th 1073, 1080, 16 P.3d 176 (2001).

Petitioner's sentence is constitutional under *Solem*. Although Petitioner's present conviction is not violent, like that of the petitioner in *Solem*, Petitioner's prior criminal history is

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8. Petitioner's prior "strike" convictions arose out out of a single trial. (Petition, Appendix 1 (Opinion at 3).)

9. In considering whether to reduce a felony offense to a misdemeanor, trial courts must be guided by the "individualized consideration of the offense, the offender, and the public interest . . . . " *People v. Superior Court (Alvarez)*, 14 Cal. 4th 968, 978, 928 P.2d 1171 (1997).

10. In deciding whether to dismiss a "strike" conviction, the trial court must consider "the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P.2d 429 (1998); *People* v. *Superior Court (Romero)*, 13 Cal. 4th 497, 530, n.13, 917 P.2d 628 (1996).

far more egregious than that of the *Solem* petitioner, because Petitioner previously committed two prior serious and two prior violent felonies. Moreover, Petitioner's sentence is less harsh than that in *Solem* because Petitioner will be eligible for parole after serving his minimum sentence of twenty-five years. *Solem*, 463 U.S. at 279-303.

Petitioner's sentence also is constitutional under Justice Kennedy's *Harmelin* test. Petitioner's criminal history is more egregious than that of the petitioner in *Harmelin* because Petitioner committed two prior serious and two prior violent felonies. Petitioner's sentence also is less severe than that imposed in *Harmelin* because Petitioner will be eligible for parole after serving his minimum term. *Harmelin*, 501 U.S. at 961-1009.

Even under *Rummel* and *Hutto*, which this Court still consider valid law, Petitioner's sentence is constitutional because Petitioner's criminal history includes two prior serious and two prior violent felonies. Petitioner also has failed to offer any sentencing factors other than those set forth in *Solem* or *Harmelin* that would allow this Court to objectively review the proportionality of his sentence. *Hutto*, 454 U.S. at 372-75; *Rummel*, 445 U.S. at 265-85.

Petitioner's sentence also is constitutional under *Andrade* because Petitioner's prior criminal history, unlike that of the *Andrade* petitioner, includes two prior serious and two prior violent felonies. *Andrade*, 270 F.3d at 748-49. Consequently, although Petitioner's present sentence for grand theft is lengthy, his record as a career criminal is equally lengthy, as well as dangerous. Therefore, his sentence of twenty-five years to life under California's Three Strikes Law is not cruel and unusual punishment.

CONCLUSION

The Petition for Writ of Certiorari presents no "compelling reasons" for granting certiorari in this case. Specifically, the rejection of Petitioner's Eighth Amendment claim by the California Court of Appeal does not conflict with the decisions of this Court or the Ninth Circuit Court of Appeals. Additionally, the present case fails to present a question of federal law requiring settlement by this Court. Accordingly, the Petition should be denied..

Dated: January 24, 2002.

Respectfully submitted,

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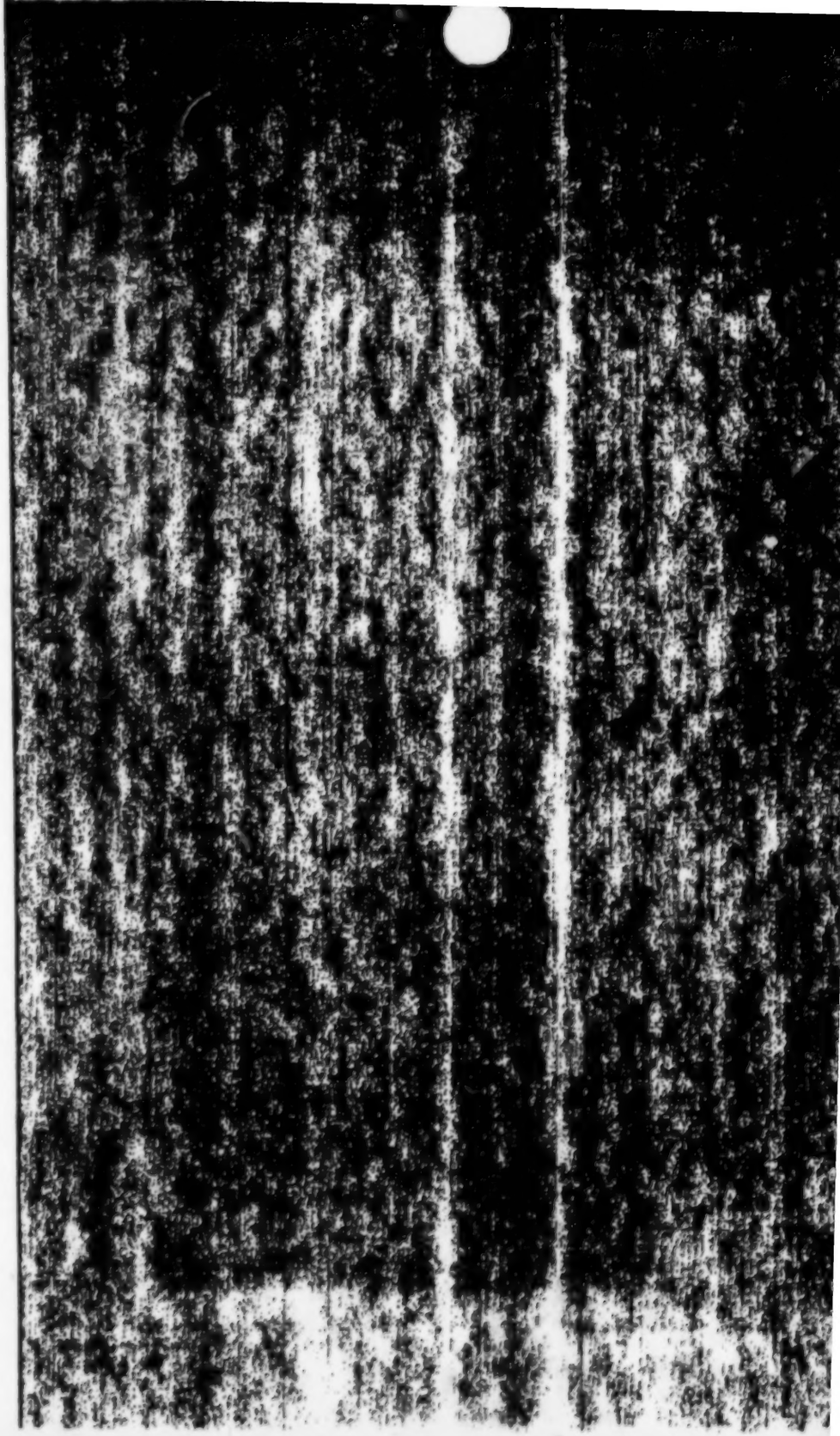

Supreme Court, U.S.
FILED
JUL 28 2002

No. 01-6978

IN THE

Supreme Court of the United States

GARY ALBERT EWING,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal for the State of California Second Appellate District

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 3, 2001
CERTIORARI GRANTED APRIL 1, 2002

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Please Note: The Decision of the Court of Appeal of the State of California, Second Appellate District, Division Six, dated April 25, 2001, is attached as Appendix 1 to the Petition for Writ of Certiorari filed on October 3, 2001.

The Order Denying the Petition for Review in the California Supreme Court on July 11, 2001, is attached as Appendix 2 to the Petition for Writ of Certiorari filed on October 3, 2001

IN THE

Supreme Court of the United States

GARY ALBERT EWING,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/10/2000	Information filed in the Superior Court of the State of California, County of Los Angeles, in case number YA043550.
6/14/2000	Jury Verdict filed finding petitioner guilty of grand theft in violation of California Penal Code section 487(a) as charged in count one of the Information.
8/3/2000	Trial Court sentenced petitioner to twenty-five years to life under California Three Strikes Law.
8/8/2000	Petitioner filed Notice of Appeal from the Judgment.
4/25/2001	Opinion issued by the California Court of Appeal, Second Appellate District, Division Six, affirming the judgment.
7/11/2001	Petition for Review denied by the California Supreme Court.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

PROBATION OFFICER'S REPORT

[Filed Aug 03, 2000]

Defendant's Name(s)		
Gary Albert Ewing		
Address (Present/Release)		
1310 West 220th Street, Apt. #10 Torrance, Ca 90501, (310) 328-8932		
Birth date 10-11-62	Gender Male	Race Black
Citizenship Status United States	Drivers License/exp. Date A6322587-Expired	
Probation No. X-232125	CII No. A09025292	Main No. 1456996
Days in Jail this Case ☒ Estimated ☐ Verified 29	Custody Status/Release Date County Jail -	
Booking No. 6390571		

Court SW-C	Judge Hollingsworth	Court Case No YA043550
Hearing Date 4-10-00	Defense Atty. PD	Prosecutor DA
DPO Tillis	Area Office HAR/ING	Phone No. (310) 419-5189

Type Report	
_____	Probation and Sentence
__x__	Pre-Conviction (131.3 CCP)

_____	Deferred Enty of Judgment
_____	Post Sentence
_____	Diversion (Specify)_____

PRESENT OFFENSE: LEGAL HISTORY

Charged with the crimes of (Include Priors, Enhancements or Special Circumstances)
487 Penal Code (Grand Theft) Count 1
459 Penal Code (Burglary) Count 2
Further Allegations: 667.5 (B) Penal Code, 1170.12(A)-(D) Penal Code, 667(B) Penal Code.

Convicted of the crimes of (Include Priors, Enhancements or Special Circumstances) N/A		
Convicted By	Date of Referral 3-27-00	Count(s) Continued to P&S for Disposition

Proposed Plea Agreement	Sources of Information Referral
Date(s) of Offense 3-12-00	Time(s) 0825 Hours

Defendant (See Prior record Section)	Holds
☐ N/A ☐ Sentenced to State Prison/County Jail on Case____ ☐ On Probation ☐ Pending Probation Violation ☐Pending New case ☒ On Parole Remaining Time 6/26/02	☒ Yes ☐ No (CDC)
Recommendation: ☐ Probation ☒ Denial ☐ Diagnostic Study ☐ CYA ☐Other ____ ☐ County Jail ☐ 707.2 WIC ☒ State Prison ☐1203.03 PC	

PRIOR RECORD: SOURCES OF INFORMATION
(this page)
FBI, CLETS.

AKA'S:
ANTHONY G. WALLACE.

JUVENILE HISTORY:

Information Is Not Available Through Probation Department Inquiry Five Years After Juvenile Probation Activity Has Terminated.

ADULT HISTORY:

11-12-84 Columbus Police Department (Ohio) - Defendant Charged With Grand Theft. On 12-26-85, Defendant Convicted, Granted Three Years Probation, Jail Suspended, Ordered To Pay A Fine of $300.

9-9-88 Los Angeles Sheriff's Office - 487 Penal Code (Grand Theft). On 11-7-88 Torrance Superior Court, Department SW-G, Defendant Pled Guilty To Case A925352, Convicted, Proceedings Suspended, Defendant Was Granted Three Years Formal Probation And Ordered To Spend One Year In County Jail.

2-25-90 Long Beach Police Department - 666 Penal Code (Petty Theft With A Prior). 9-17-90 Defendant Convicted In Long Beach Municipal Court On Case 90M03784, Defendant Granted Three Years Probation And Ordered To Spend 60 Days In Jail. 2-26-93, Probation Was Terminated Pursuant To Section 1203.3 Penal Code.

7-10-92 Torrance Police Department - 242 Penal Code (Battery). On 8-26-92, Torrance Municipal Court,

Defendant Convicted On Case 92M07646, Defendant Granted Two Years Summary Probation And Ordered To Spend 30 Days In County Jail.

8-13-92 Los Angeles Police Department - 484 Penal Code (Theft). On 8-14-92, In Los Angeles Municipal Court, Defendant Was Convicted On Case 92R16540, Defendant Granted 12 Months Probation And Ordered To Spend Ten Days In County Jail.

1-9-93 Seal Beach Police Department - 459 Penal Code (Burglary), 148.9 Penal Code (Obstruction Of Justice). On 1-12-93, In Westminster Municipal Court (Orange County) Defendant Convicted On Case SBW251139P0 On Count 2, Defendant Granted One Year Summary Probation And Ordered To Spend 60 Days In Jail.

2-24-93 Los Angeles Sheriff's Office - 11364 Health And Safety Code (Possession Of Drug Paraphernalia). On 2-26-93 Bellflower Municipal Court, Defendant Convicted On Case 93M00860. Proceedings Suspended, Defendant Granted Three Years Probation And Six Months In County Jail. Probation Is Scheduled To Expire On 2-25-96.

7-29-93 Long Beach Police Department - 666 Penal Code, Count 1; 484 Penal Code, Count 2. On 9-13-93, Defendant Convicted On Case 93M04494, Case Heard In Long Beach Municipal Court, Defendant Convicted Of The Charge Of 485 Penal Code (Appropriate Lost Property), Defendant Granted Two Years Summary Probation And Ordered To Spend Ten Days In County Jail. This Probation Grant Expired On 9-12-95.

9-10-93 Long Beach Police Department - 12020 Penal Code (Possession Of A Firearm), 602.5 Penal Code (Trespassing). On 9-22-93, Long Beach Municipal Court, Defendant Convicted Under Case Number 93M05478, Defendant Granted One Year Probation And Ordered To Spend 30 Days In County Jail.

12-9-93 Long Beach Police Department - 212.5 Penal Code (Robbery), 459 Penal Code (Burglary). On 3-8-94, Matter Heard In Long Beach Superior Court, Department 30-L. Defendant Convicted On Case NA018343, Defendant Found Guilty By Jury, Probation Denied, Defendant Sentenced To Nine Years In State Prison.

(Defendant Was Received By The Department Of Corrections Under The California Department Of Corrections Number J-15228. Department Of Corrections Records Indicate The Defendant Was Paroled From State Custody On June 26, 1999.)

Case Number:	YA043550
Case Name:	People vs. Gary Ewing
Torrance, California	Thursday, August 3, 2000
Department No. TO6	Hon. Deanne Myers, Judge
Reporter:	Christine Cheatham, CSR. No. 2350
Time:	10:20 A.M.

APPEARANCES:

(Appearances As Heretofore Noted.)

[1501] THE COURT: Let me call Gary Ewing.

MS. LINK: Deputy District Attorney Jodi Link on behalf of the People.

MS. BRISTO: Gail Bristo on behalf of Mr. Ewing who is present.

THE COURT: Mr. Ewing, The matter is here today for your sentencing on count 1. Hold on just one moment.

All right. I previously—I was just checking the date. July 18 there was a court trial as to the priors. The prior allegations were found to be true. We continued it over to today simply for sentencing.

Mr. Ewing, I want you to know your attorney has submitted a number of letters on your behalf including one from Henry Gutierrez, of the sheriff's department. Actually I guess two letters from him.

MS. BRISTO: Yes. I believe they basically reference the same things.

[1502] THE COURT: Right.

MS. BRISTO: He has two additional letters. One he wrote and a letter from a chaplain.

THE COURT: I have a letter from Anthony Williams that I reviewed and a Mary V-I-G-I-L, Mary Vigil, a number of letters from Rebecca Coon.

MS. BRISTO: If I could approach with the other two letters.

THE COURT: All right.

MS. BRISTO: One is from Mr. Ewing himself.

The Court: All right. I received two other letters. I'll take a moment to read them but I want the record to also reflect that I just told both counsel this, I have reviewed the court file in his previous case, NA018343.

There are a number of items in that file that I have reviewed and reviewed the appeal, the facts of the case, a letter from the Department of Corrections, et cetera. Is he ready to proceed for sentencing?

MS. BRISTO: Yes, your honor.

THE COURT: Does he waive arraignment for sentencing, any legal reason that sentence cannot be imposed?

MS. BRISTO: Waive further arraignment. No legal cause.

THE COURT: All right. Let me review these letters first then I will hear from each of you and we will proceed. Just a moment.

[1503] (COURT READS THE LETTERS.)

THE COURT: Mr. Ewing, I reviewed the letter you wrote as well as the letter from Catholic Jail Chaplain Moen I believe is his name.

All right. Anything either counsel wishes to say? Ms. Bristo.

MS. BRISTO: Yes, your honor. I just have two motions. One to reduce pursuant to 17b to a misdemeanor. The nature of the charge is grand theft, it's a wobbler. There also would be a motion to strike an appropriate number of strikes pursuant to 1385 and as to 2, I just request to be heard at the same time.

Note that the nature of the present offense is non violent, the theft of three golf clubs. I believe the value total is in the area of a thousand dollars. I also note with regard to his priors, I reviewed some of his file. The priors consist of two residential burgs, second degree—two residential burglary convictions, residential robbery conviction, and another residential burglary conviction.

I would note that of the four strikes, two would be non violent. That would be the two residential burglaries that did not involve the use of a knife.

With regard to the other two, it's the same incident from my reading of the complaint. The residential robbery of a victim by the name of Steven Jordan, [1504] I believe count 1 and 2 of the prior case.

Although that incident does involve actual violence, the other two convictions involve felonies of a serious nature as opposed to a serious and violent nature.

THE COURT: Wasn't one of them—one of the residential burglaries a nighttime burglary where somebody was present? This is maybe the woman woke up and the wine bottle was there and they took fingerprints.

MS. BRISTO: I don't know. I wouldn't know.

THE COURT: I think so.

MS. BRISTO: Certainly in reviewing it, I am not minimizing the seriousness of the nature of the offense, the third strike law certainly is designed to encompass serious felonies also but I think one of the big concerns is violence

with regard to Mr. Ewing's history and this includes all convictions for anything.

The history of his convictions for violence involves the first two counts of that complaint. This would be the one where the knife was alleged, would be my position, actual violence. The use of a knife would be considered actual violence with somebody present. My understanding from reading that, that is counts 1 and 2, that was the same incident.

THE COURT: Okay.

MS. BRISTO: With regard again to the rest of his history, he does have quite a few theft convictions, misdemeanors. He may have one of the—a felony theft conviction. I believe this would be his third felony [1505] case. He has been to prison one time and that was for the events that are the strike convictions.

Again with regard to factors as they relate to Mr. Ewing, as the court is aware from reading the prior file, during his commitment for the strike offenses he did apparently become very ill. At the time that that happened a letter was sent to the court suggesting he was terminally ill. He did recover as the court would be aware, he is here, although the information in that report I think the court indicated made some reference to the fact he wouldn't be able to commit any further crimes under the circumstances at that time. I am sure it was quite apparent. Fortunately he did recover.

THE COURT: I will not dispute what they say.

MS. BRISTO: Right. With regard to sentencing, I think one factor the court can consider in deciding whether they would be able to strike strikes would be would the interest of society be met by any alternative terms of commitment. Age is a factor that can be considered. Although Mr. Ewing is only 38, I suggest to the court in terms of his health, at the

time of the prior offenses he wasn't in the condition of full blown AIDS. To our knowledge this was diagnosed sometime while he was in prison. I am not sure of when he actually contracted the disease. The disease resulted in him becoming blind in one eye. I recall looking at the weights of him at the time he was incarcerated on that case and now I think he is a little bit smaller man but my position would be [1506] although he is still a younger man, because of the condition he is in and because of his past, the likelihood of him committing violent offenses in the future is minimized and I don't think he would be a threat in the future.

I note with regard to the priors that they occurred within a short period of time. They are on one case although with res burgs they are a little bit distinct in it has to be a separate act. In most—other than count 1 and count 2, there would be two—three separate acts.

THE COURT: Three separate dates apparently within a month, but three separate dates.

MS. BRISTO: This occurred during a short period of time in his life with regards to the strike period of three months and again the rest of his life, although it does reflect theft convictions, it doesn't reflect this type of possibly violent offenses.

With regard to the letters that have been submitted, I would argue to the court that one of the factors you consider is his prospects upon release, whenever that may occur.

It does appear from the number of letters he has—he does have support, that there is support for him in the area of getting into programs that might benefit him. One of the letters refers to the possibility of him being an AIDS advocate where he could speak to others about some of the tragedy that could befall them in [1507] addition to the disease if you were not to basically take care of the things you take care of.

As indicated in the letter, in the past cases his underlying problem does seem to be drug related. My recollection looking through his record, he has never actually received any assistance for that and that can be a factor although it doesn't mean he gets a program or anything like that necessarily. It can be a factor that somebody has been through the system. On several dates he never actually received any treatment. The court could consider that in mitigation, consider whether to strike the strike.

I just request based on everything that this is not the type of case where the interests of society are best served by giving Mr. Ewing a life sentence.

THE COURT: Ms. Link.

MS. LINK: People respectfully disagree. To argue that the defendant has only four strike priors which are residential burglary and residential robbery with use of a weapon and since that time he has not, to his credit, I guess, picked up any new violent felonies, he was only out of custody for seven months between the time he was paroled from that case and the time that he committed this new offense. So people don't find that argument is persuasive in the least.

He has had ten convictions in his lengthy criminal history for someone as young as he is, being only 38, five of which have been felonies. He has repeatedly [1508] been placed on probation. He has repeatedly failed miserably at probation. He goes to state prison, he gets paroled. He fails miserably on parole.

People do not find there is anything redeeming that should warrant the court to strike his very serious and very violent strikes. We would ask for the sentence to be imposed as 25 to life. He has certainly, out of all this time, earned that sentence.

THE COURT: All right. Anything from Mr. Ewing at all?

THE DEFENDANT: Yes, your honor. I would just like to beg the mercy of the court asking that any sentence I be given be suspended and I'm given a chance in a drug rehab to get my life together. I don't have very long and the little time I do have left to live I want to do something, make myself better. I am—when I came home everything hit me at one time and I left the drug rehab, you know. What really hit me was the loss of my mother, my brother. My family wasn't there. It was because of my disease and they drove me to doing drugs.

Again all I am asking for is to spare—suspend my sentence, give me a chance to get into a program and get the help that I need.

THE COURT: Okay. Anything else, Ms. Bristo, before sentence is imposed?

MS. BRISTO: No, your honor.

THE COURT: Mr. Ewing, let me first indicate to you as follows.

[1509] Because of the nature of this offense, you know, I have reviewed your prior file, I reviewed it carefully anticipating there would be a motion to strike certain—some of the strikes.

How much—the real test is whether you are outside the spirit and the intent of the three strikes law and it may be a harsh law in that the charge that you're convicted for is non violent but I cannot, based upon your record, and let me just tell you the two principle factors are one, that you have convictions, some of them are misdemeanors, but basically almost consistently from 1988 for the first felony theft until 1993 when you committed the strike offenses, I mean that is a period of basically five years, and there were nine convictions more or less, almost consistently. Mind you, some of them were misdemeanors, but they were all theft cases and until we get to the strikes there was a battery and there was—and I

recognize that those may be non violent, but nonetheless there is just consistent criminal activity. Maybe it is based upon a drug problem, but I don't think that kind of a record takes you outside the spirit and the intent of the three strikes law.

Then I think the other factor that is of terrible concern, and again I cannot find that you're outside the spirit and the intent of the law which is harsh, that is the law, is that you were paroled in June of 1999 and this offense is committed in March. I mean you have hardly even—you have hardly been out of the [1510] state prison and it may be because of—drugs may be sort of the reason for these continued offenses but nonetheless it does not present someone who should be outside the spirit and the intent of the law.

So I have given a great deal of thought to it because the nature of the current offense is one that one does think about it, but as I say, your record and the timing of when you're released on parole and this offense occurs, is just such that I think there is no way I could find, which is what I am required to find, you are outside the spirit and the intent. I do have to consider threats to the community and although there isn't a real pattern of violent crimes that you pose a threat, you are clearly posing a threat for theft offenses. So clearly I mean it's just—the record just screams out for that. And it's for that reason that I cannot consider and will not strike any of the strikes.

I am going to impose the required sentence which is life with a minimum of 25 years. Let me ask both counsel, I do believe and I did not have a chance to look at this, I do believe I have the authority not to impose an additional year because of the 667.5 conviction. Does everyone concur with that?

MS. LINK: Yes.

MS. BRISTO: Yes.

THE COURT: I feel that his record—because that is a strike conviction, is also the one for which he served the prison time. To impose anything further would [1511] be out of bounds basically.

So, Mr. Ewing, you were found guilty by the jury on Count 1. You were found not guilty on Count 2. I did find true the prior strike convictions and also the prison prior pursuant to 666.5(b) therefore on count 1 the sentence will be as follows. you are going to be sentenced to state prison for a period of life with a minimum of 25 years.

As you know, you will be required to serve 80 percent. You're only eligible for 20 percent conduct credits.

What sort of credits does he have to date, Ms. Bristo?

MS. BRISTO: I was adding them up.

THE COURT: While you're doing that, I am going to impose a $200 restitution fine, a parole revocation fine of $200 that will be stayed. You understand that if and when you are released you will be placed on parole for a period of five years, not a three year period because of the life term, correct, counsel? I believe it's a five year parole period. I am aware of your health issues so I don't know.

MS. BRISTO: 144 days.

THE COURT: What sort of credit?

MS. BRISTO: 144 actual.

THE COURT: You're going to receive 144 plus 72 conduct credits for a total of 216 Days.

This will be forthwith to the Department of [1512] Corrections. I believe that concludes this sentence.

MS. BRISTO: His appeal rights. He will be filing an appeal.

THE COURT: Mr. Ewing, You do have a right to file a notice of appeal. Understand that on a notice of appeal if you cannot afford counsel the appellate court will appoint counsel for you. Ms. Bristo will assist you. She will assist you if you wish to file the notice of appeal. In order to appeal you must file a notice of appeal within sixty days of today's date, from sentence, and the notice is filed in this court. She will remain as counsel to assist you in filing the notice of appeal. All right.

(Proceedings concluded.)

(5)

Supreme Court, U.S.
FILED
JUL 28 2002
OFFICE OF THE CLERK

No. 01-6978

IN THE

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GARY ALBERT EWING,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal for the State of California Second Appellate District

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QUESTION PRESENTED

Does petitioner's enhanced sentence for shoplifting three golf clubs—life imprisonment without possibility of parole for at least twenty-five years—violate the Eighth Amendment's prohibition against cruel and unusual punishments?

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IN THE

Supreme Court of the United States

No. 01-6978

GARY ALBERT EWING,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the
Court of Appeal for the State of California
Second Appellate District

BRIEF FOR PETITIONER

OPINIONS BELOW

The California Supreme Court's summary denial of Mr. Ewing's Petition for Review was entered on July 11, 2001, is unreported, and is reprinted in the Appendix to the Petition for Certiorari. *See* Pet. App. 2. The opinion of the California Court of Appeal, Second Appellate District, Division Six, was entered on April 25, 2001, is unreported, and is reprinted in the Appendix to the Petition for Certiorari. *See* Pet. App. 1. The sentencing decision of the California Superior Court was rendered on August 3, 2000, was made orally in court, was transcribed at Reporter's Transcript 1501 through 1512, and is reprinted in the Joint Appendix. *See* JA 7-16.

STATEMENT OF JURISDICTION

The California Supreme Court denied Mr. Ewing's Petition for Review on July 11, 2001. Mr. Ewing timely filed a petition for writ of certiorari on October 3, 2001. The petition was granted on April 1, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, California Penal Code sections 17(b), 18, 487(a), 654, 667(b) through (i), and 1170.12 (a) through (d), and California Rules of Court 420-423 (West 1999) (renumbered 2001) are reproduced in Appendix 1.

STATEMENT OF THE CASE

This case concerns the constitutionality of a life sentence without possibility of parole for twenty-five years, imposed under California's "Three Strikes, and You're Out" law, for the offense of shoplifting three golf clubs.

A. Facts of the offense

On the morning of March 12, 2000, Petitioner Gary Ewing entered a golf pro shop in Los Angeles County, California. He asked the man who worked there several questions, and then looked around the shop for about ten to fifteen minutes. RT 352. He again approached the employee and purchased a token redeemable for golf balls on the driving range. RT 353. He once more looked around the pro shop, this time in the area where golf clubs were displayed. He returned a third time to the employee, asking him where the driving range was. The employee directed him to an exit on one side of the pro shop. Instead of exiting through that door, however, Mr. Ewing left the shop through a door in the opposite direction,

which led to the parking lot. RT 355. The employee observed that Mr. Ewing was walking with a noticeable limp, which he had not seen during their two earlier encounters. The employee called 911. RT 355-356. When the police arrived, they discovered Mr. Ewing between two parked cars pulling three golf clubs from his pants leg. RT 387. The police told him to put down the clubs, each of which retailed for $399. Mr. Ewing complied and was taken into custody without incident. RT 387-388.

B. Procedural History

Mr. Ewing was charged by Information with, and ultimately convicted of, one count of grand theft of personal property in violation of California Penal Code section 487(a) (value of property in excess of $400).[1] CT 25-27. Grand theft is one of a group of offenses in California known as "wobblers." *See* Cal. Penal Code § 489 (West 1999); *People v. Douglas*, 79 Cal.App.4th 810, 813 (2000). A wobbler is an offense that may be punished in the discretion of the prosecutor or the court alternately as a misdemeanor with a sentence to imprisonment in a county jail for not more than one year,[2] or as a felony with a sentence to state prison. *See* Cal. Penal Code § 17(b) (West 1999); *People v. Superior*

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[1] The Information also charged Mr. Ewing with one count of burglary in violation of California Penal Code section 459, but the jury found him not guilty of that offense. CT 80-81.

[2] If a wobbler is sentenced as a misdemeanor, it is thereafter considered a misdemeanor for all purposes. Cal. Penal Code § 17(b); *but see People v. Franklin*, 57 Cal.App.4th 68, 73 (1997) (a wobbler where defendant is committed to the California Youth Authority and upon discharge the offense is reduced to a misdemeanor under § 17(c) qualifies as a strike under the Three Strikes law).

Court (Alvarez), 14 Cal.4th 968, 974 (1997). The felony sentence for grand theft is imprisonment for sixteen months, two years, or three years. *See* Cal. Penal Code §§ 489(b), 18.[3]

The Information also alleged that Mr. Ewing had suffered four prior felony convictions for purposes of an enhanced sentence under California's "Three Strikes, and You're Out" law. Cal. Penal Code §§ 667(b)-(i) (West 1999) and 1170.12(a)-(d) (West Supp. 2002).[4] That law applies when a defendant is convicted of any felony, and it is pleaded and proved that he was previously convicted of two or more enumerated "serious" or "violent" felonies ("strikes"). In those circumstances, the mandatory sentence for the current felony is life imprisonment with no possibility of parole before completion of a minimum term of twenty-five years. Cal. Penal Code § 667(e)(2). Prison conduct credits may not be applied to reduce that minimum. *In re Cervera*, 24 Cal.4th 1073, 1080 (2001). The same "enhanced" sentence applies even when the current felony is not one of the "serious" or "violent" offenses that qualify as strikes, and even when the current offense is a wobbler charged as a felony.

The trial court found the allegations of Mr. Ewing's 1994 felony convictions true and further found that the convictions qualified as strikes under the Three Strikes law. RT 1203.

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[3] Whether sentenced to sixteen months, two years or three years, a defendant can earn up to half off his or her sentence by good behavior in prison, along with participation in work, training, or education programs. Cal. Penal Code §§ 2930-2933 (West 1999).

[4] California's Three Strikes law is codified in two nearly identical statutes. The first, California Penal Code section 667, was enacted by the Legislature. The second, California Penal Code section 1170.12, was approved by California voters through the ballot initiative process. *See generally, People v. Superior Court (Romero)*, 13 Cal.4th 497, 504 (1996). As concerns this case, the two statutes contain no substantive differences. Further citations to the Three Strikes law will be to Section 667.

Mr. Ewing's prior strikes were three burglary convictions and a single robbery conviction that was related to one of the burglaries. The underlying conduct for these prior convictions all occurred within a single month in 1993 and was the subject of a single criminal proceeding, Los Angeles County Superior Court Case Number NA018343. JA 9-11. Two of the burglaries were non-violent, but qualified as "serious" crimes under the Three Strikes law. In the third burglary (also charged as a robbery), Mr. Ewing brandished, but did not use, a knife. *Id.* Mr. Ewing was sentenced to a single term of imprisonment of nine years, eight months for these offenses, and was released on parole after approximately five and a half years. JA 6; CT 87.[5]

In the instant proceeding, Mr. Ewing asked the trial court to sentence the conviction for theft of three golf clubs as a misdemeanor, as the court was entitled to do pursuant to Penal Code section 17(b). He also moved, in the alternative, to strike his prior convictions pursuant to Penal Code section 1385, which authorizes a trial court to strike prior felony conviction allegations in certain circumstances. CT 92; JA 9; Cal. Penal Code § 1385(a) (West 2000); *Romero*, 13 Cal.4th at 529-30.[6] Finally, Mr. Ewing, who was 38 at the time of

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[5] The nine-year, eight-month prison term for all the offenses was the maximum available under the law, and was composed of a sentence of six years for the robbery conviction; one year, four months each for two of the burglary convictions; and a one-year enhancement for brandishing a knife.

The sentence on the third burglary conviction, which involved the same victim as the robbery conviction, was stayed based on California's statutory prohibition against multiple punishment. *See* Penal Code § 654(a) ("[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment"). CT 87.

[6] A sentencing court may strike a prior felony allegation only if,

> in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars

sentencing, asked the trial court to take into account his health condition as a mitigating factor—he has AIDS and has already become blind in one eye as a result of the disease. JA 11.

The trial court denied Mr. Ewing's motions. Although alluding to the possibility that Mr. Ewing's criminal activity was the product of his drug problem, the court nevertheless found that he fell within the spirit and intent of the Three Strikes law: "I do have to consider threats to the community and although there isn't a real pattern of violent crimes that you pose a threat, you are clearly posing a threat for theft offenses." JA 14. The court then imposed the mandatory sentence of life imprisonment without possibility of parole for at least twenty-five years. JA 14.

Mr. Ewing appealed his conviction and sentence to the California Court of Appeal. CT 94. He argued, *inter alia*, that his sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution because it is grossly disproportionate to his offense of shoplifting three golf clubs. In an unpublished opinion, the Court of Appeal affirmed the conviction and life sentence, concluding that Mr. Ewing's sentence was not cruel and unusual. Pet. App. 1 at 7.

SUMMARY OF THE ARGUMENT

A state may not sentence an individual to a punishment that is grossly disproportionate to the crime he or she has committed. Such a sentence violates the Eighth Amendment's

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of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.

People v. Williams, 17 Cal.4th 148, 161 (1998).

prohibition against cruel and unusual punishments. *Solem v. Helm*, 463 U.S. 277, 302 (1983); *Harmelin v Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring and dissenting); *see Weems v. United States*, 217 U.S. 349, 377 (1910).

To determine whether a particular sentence is grossly disproportionate, a court first evaluates "the gravity of the offense and the harshness of the penalty." *Helm*, 463 U.S. at 291-92. If that evaluation "leads to an inference of gross disproportionality," then the court may compare the sentence against other sentences imposed within the state, and against sentences imposed in other jurisdictions for the same offense to determine whether such comparisons confirm the inference. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). When evaluated under these criteria, Mr. Ewing's sentence is grossly disproportionate to his crime and must be vacated.

His offense—taking three golf clubs from a pro shop without paying for them—is not a violent crime. Standing alone, it would not even count as a prior "strike," because it is not considered by California as "serious" for purposes of its Three Strikes law. It is not even a felony in every case, but rather, is a "wobbler," a crime that can be punished, in the discretion of the prosecutor or the sentencing judge, as either a misdemeanor or a felony. Absent application of the Three Strikes law, the maximum sentence authorized by California for this theft when treated as a felony is two years, unless aggravating circumstances exist (in which case the maximum sentence is three years), with parole eligibility after serving one-half the sentence. California has determined that in the spectrum of criminal conduct, petitioner's offense is unquestionably among the least significant.

By contrast, Mr. Ewing's actual sentence of life, with a minimum of twenty-five years regardless of his good conduct in prison, is one of the most severe that California courts are

authorized to impose. Only two sentences—death, and life without parole—are more harsh, and those sentences are reserved for those who commit the most violent and reprehensible crimes.

The only justification advanced for the severity of petitioner's sentence is his status as a repeat offender. It is well established that a state may punish a recidivist more harshly than a first offender. *Rummel v. Estelle*, 445 U.S. 263, 268 (1980). Nevertheless, recidivism alone does not justify any and all sentences—even repeat offenders retain Eighth Amendment protection against cruel and unusual punishments. *Helm*, 463 U.S. at 296-300 (life sentence unconstitutional for defendant who issued a no-account check, notwithstanding his six prior felony convictions, including three for burglary).

A state that has previously punished a defendant for certain crimes may not punish him again for those same crimes. *Brown v. Ohio*, 432 U.S. 161, 169-70 (1977). Accordingly, even where, as here, recidivism is the state's sole rationale for an exceptionally harsh punishment, the focus of the Eighth Amendment inquiry is on whether the sentence is grossly disproportionate to the current crime. *Helm*, 463 U.S. at 296 n.21.

Here, as in *Helm*, petitioner's sentence far exceeds any reasonable recidivism enhancement of the penalty for grand theft. The minimum term that Mr. Ewing must serve without consideration for parole—twenty-five years—is twenty-five times longer than the one-year maximum sentence he could have received had the shoplifting crime been his first offense and treated as a misdemeanor. It is nineteen times longer than the sixteen-month sentence he would have received for felony grand theft as a first-time offender. Indeed, even if he were to receive the maximum three-year sentence because of his prior record, his minimum term under the Three Strikes

law is sixteen and two-thirds times longer than the time he likely would actually serve on the three-year sentence.

Mr. Ewing's sentence was enhanced because of his prior record, his "strikes." However, the twenty-five-year minimum sentence he received is more than two-and-one-half times greater than the nine-year, eight-month sentence he had previously received for the strike crimes themselves (a sentence reducible by one-half through good time credits).

Petitioner's sentence is more disproportionate than that upheld in *Rummel*. In *Rummel*, the defendant faced a sentence of up to ten years for his current offense of obtaining money by false pretenses, which the recidivist law increased to life imprisonment with possibility of parole after ten to twelve years. Thus, Rummel's sentence was enhanced for recidivism from a maximum of ten years to a minimum of ten to twelve. By contrast, because of his prior record, Mr. Ewing's sentence was increased from a maximum of three years to a minimum of twenty-five years.[7]

The Three Strikes law imposes a punishment enhancement based on recidivism that is disproportionate to enhancements California proscribes for other, equally or more serious, aggravating factors. For example, a defendant who is armed with a firearm or who uses a deadly or dangerous weapon while committing a crime merits a sentencing enhancement of one year under California law, and would receive an enhancement of three years if he personally inflicted great bodily

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[7] Moreover, the Texas habitual offender law did not apply unless the defendant not only had been convicted twice but also had served two prior terms of imprisonment. By contrast, the California Three Strikes law requires no prior term of imprisonment, and Mr. Ewing had been imprisoned on only one prior occasion.

injury on a victim. This is a far cry from the escalation to a twenty-five-year minimum sentence that the Three Strikes law imposes based on recidivism.

The extraordinary increase in minimum incarceration time for "third strikers" also greatly exceeds the enhanced sentencing that California elsewhere provides for recidivism. California generally limits such enhancements to an additional sentence of one to five years, or, at the most, to twice the sentence for the current crime, thus preserving some rough proportionality between the current crime and the sentence, enhanced for recidivism. By contrast, the Three Strikes law automatically fixes an extraordinarily harsh sentence of at least twenty-five years on all defendants with two strikes who commit a third felony. A twenty-five-year minimum, "one size fits all" sentence is grossly disproportionate as an enhancement for recidivism.

A threshold examination of the harshness of Mr. Ewing's sentence for relatively minor criminal conduct thus raises a strong inference that the sentence is grossly disproportionate to the crime. That inference is amply validated by consideration of other aspects of California's sentencing scheme. As in *Helm* and *Weems*, petitioner's minimum sentence is substantially more severe than the minimum terms without parole that California has authorized for numerous crimes that objectively are far more serious than petitioner's. For example, California imposes a minimum term of seven years before parole eligibility for many violent crimes, including torture, kidnapping for ransom, and attempted murder, including by detonation of an explosive device with intent to kill. *See* Cal. Penal Code §§ 3046(a), 12308 (West 1999). Thus, a first-time offender who blew up the pro shop in an effort to kill the pro shop clerk or who kidnapped the clerk to rob him would be eligible for parole in California nearly two decades before Mr. Ewing.

A finding of gross disproportionality is further confirmed by consideration of the sentence that Mr. Ewing would have received had he committed the same crime with the same prior record in a different state. As in *Helm*, it is clear that petitioner would not have received such a severe sentence in hardly any other state. In forty-three states, the District of Columbia, the federal courts, and the military courts, Mr. Ewing could not have received a life sentence at all. Indeed, in thirty-three of these states, the *maximum* sentence he could have received was ten years—forty percent of his *minimum* sentence under California law. At the time Mr. Ewing was sentenced, only one state—Louisiana—might have mandated a harsher sentence than California, life without possibility of parole. Louisiana has since amended its law so that Mr. Ewing would now face a sentence of only six-and-two-thirds to twenty years. Only five states would have even authorized a court to consider, in its discretion, whether to impose a life sentence, and if sentenced to life in those states, Mr. Ewing would be eligible for parole far sooner than in California. A comparison with other states thus further reinforces the finding that petitioner's sentence is grossly disproportionate to his crime.

Thus, in light of this Court's analysis in *Helm* and *Harmelin*, Mr. Ewing's sentence for shoplifting three golf clubs constitutes cruel and unusual punishment in violation of the Eighth Amendment.

ARGUMENT

The Eighth Amendment's prohibition against cruel and unusual punishments, which applies to the states through the Due Process Clause of the Fourteenth Amendment,[8] bars states from imposing sentences that are grossly disproportionate to the underlying crime. *Helm*, 463 U.S. at 290; *see*

[8] *Robinson v. California*, 370 U.S. 660, 667 (1962).

also Atkins v. Virginia, No. 00-8452, 536 U.S. ___ , slip op. at 5 (June 20, 2002); *Rummel*, 445 U.S. at 274 n.11; *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opn.); *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (plurality opn.); *Weems*, 217 U.S. at 371. In *Helm*, this Court invalidated a life sentence for the crime of uttering a check against a non-existent bank account, finding the sentence to be disproportionate to the crime, notwithstanding the defendant's six prior felony convictions (including three burglary convictions) and the state's admittedly legitimate interest in enhancing punishment for habitual offenders. 463 U.S. at 303. In *Harmelin*, seven members of this Court confirmed both that a grossly disproportionate term of imprisonment violates the Eighth Amendment, and that the objective factors considered in *Helm* remain relevant to the evaluation of proportionality. 501 U.S. at 1001 (Kennedy, J., concurring); *id.* at 1009 (White, J., dissenting); *id.* at 1027-1028 (Marshall, J., dissenting). As this Court recently explained, "[t]he Eighth Amendment succinctly prohibits 'excessive' sanctions." *Atkins*, No. 00-8452, 536 U.S. ___, slip op. at 5.

This Court has established a three-step analysis for determining whether a sentence violates the Eighth Amendment. First, the gravity of the offense must be compared to the harshness of the penalty. *Helm*, 463 U.S. at 290-91. Second, the sentence imposed must be compared to the sentences authorized for other offenses in the same jurisdiction. *Id.* at 291. Third, the sentence imposed must be compared to the sentences imposed for the same offense in other jurisdictions. *Id.*; *see also Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

The first step in the analysis is a threshold test. *Id.* If a comparison of the gravity of the offense and the harshness of the penalty raises an inference of gross disproportionality, the analysis then proceeds to the second and third steps. Eighth Amendment review of a sentence "should be informed by

'objective factors to the maximum possible extent.'" *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 274-275 (internal quotation omitted));[9] *see also Helm*, 463 U.S. at 290. Substantial deference must be accorded to the legislature's determination that a sentence is appropriate for the offense. *See Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring). Nonetheless, "courts are competent to judge the gravity of an offense, at least on a relative scale." *Helm*, 463 U.S. at 292.

I. THE CALIFORNIA "THREE STRIKES, AND YOU'RE OUT" LAW

Under the California law, defendants with prior qualifying convictions or "strikes" receive longer sentences of imprisonment upon a subsequent felony conviction. Only "serious" or "violent" felonies, as defined in California Penal Code sections 1192.7(c) and 667.5(c), respectively, qualify as prior strikes. Cal. Penal Code § 667(d)(1). The "triggering" (*i.e.*, current) offense, however, may be any felony under California law, *Cervera*, 24 Cal.4th at 1075, including a wobbler, an offense alternatively punishable as a misdemeanor or a felony, at the discretion of the prosecutor or the court. *People v. Terry*, 47 Cal.App.4th 329, 332 (1996).[10]

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[9] Although *Harmelin* is this Court's most recent case addressing the application of the Eighth Amendment to prison terms, it did not result in a majority opinion; Justice Kennedy's concurring opinion provided the narrowest basis for the decision. As a result, lower courts have generally adopted and applied Justice Kennedy's analysis of the Cruel and Unusual Punishments Clause as the "Rule of Harmelin." *See Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998); *but see United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995) (applying *Helm*); *Henry v. Page*, 223 F.3d 477, 481-482 (7th Cir. 2000) (same).

[10] California Penal Code section 17 was amended in 1874 to establish wobblers. Cal. Code Amends. 1873-1874, ch. 196, § 1, p. 455. In

Under the "second strike" provision of the law, a defendant with one prior strike who is convicted of any felony receives a sentence twice as long as the sentence he or she would otherwise have received. Cal. Penal Code § 667(e)(1). A determinate sentence for a "two striker" can be reduced by as much as twenty percent through good time credits. Cal. Penal Code § 667(c)(5).

When a defendant convicted of any felony has two or more prior strikes, the "third-strike" provision requires a sentence of at least twenty-five years to life (*i.e.*, an indeterminate life sentence with no eligibility for parole for at least the first twenty-five years). Cal. Penal Code § 667(e)(2)(A)(ii). The actual minimum term is the greater of (a) the term otherwise provided for the current offense with enhancements, (b) triple the term otherwise provided for the current offense without enhancements, or (c) twenty-five years. *Id.* § 667(e)(2)(A). Unlike other defendants, a three-striker is not eligible to reduce his minimum term by good-time or work-time credits while in prison. *Cervera*, 24 Cal.4th at 1080.

As noted, while the first and second strikes must be "serious" or "violent" felonies, there is no such requirement for the current conviction. The third conviction may be any felony at all, and can even be a wobbler.[11] In these

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exercising its discretion under that section, the sentencing court is to consider the nature and circumstance of the offense, the defendant's appreciation of and attitude toward the offense, his traits of character, and, when appropriate, general objectives of sentencing. *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 978 (1997). The California Supreme Court has made clear that "the fact that a crime punishable as a felony or a misdemeanor is regarded as a felony unless and until the trial court imposes a misdemeanor sentence does not show that the Legislature prefers a felony sentence to be imposed by the trial court." *In re Anderson*, 69 Cal.2d 613, 626-27 (1968).

[11] The following wobblers can be felonies under California law: issuing checks greater than $200 with insufficient funds (Cal. Penal Code § 467a); theft of domestic fowl, avocados, olives, citrus or deciduous

circumstances, the "Three Strikes" law is a misnomer; it is really "Two Strikes and a Foul Ball, and You're Out." In addition, several other features of California's Three Strikes law combine to make it particularly severe:

1. A defendant may be considered to have two prior strikes even though he was convicted of both qualifying offenses in a single judicial proceeding. *People v. Askey*, 49 Cal.App.4th 381, 386 (1996);

2. A prior conviction qualifies as a strike even if the sentence for that conviction was stayed under California Penal Code section 654(a), the statutory ban on multiple punishments. *People v. Benson*, 18 Cal.4th 24, 30 (1998);

3. To qualify as a three-striker, the defendant need not have served any prior term of imprisonment. Cal. Penal Code § 667(d)(1)(A) & (B); *compare Rummel*, 445 U.S. at 278 (Texas habitual offender law applies only if the defendant is convicted of a felony and actually sentenced to prison, then convicted of another felony and actually sentenced to prison, and then convicted of a third felony);

4. Prior strikes need not be violent offenses as long as they qualify as "serious" (*e.g.*, a residential burglary where the burglar was unarmed and residents were not home would be considered a prior strike). Cal. Penal Code §§ 1192.7(c)(18), 460(a);

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fruits, vegetables, nuts, or artichokes worth more than $100 (§ 487(b)(1)(A)); sale of five or more multichannel video descramblers (§ 593d(d)(2)(A)); vandalism of a cemetery or mortuary property (§ 594.35); recidivist affixing of graffiti (§ 594.7); dogfighting (§ 597.5); eavesdropping on a confidential communication (§ 632); disclosure of a telegraphic or telephone communication without the addressee's consent (§ 637); failure to appear on a felony charge (§§ 1320, 1320.5).

5. "Serious" or "violent" felony convictions incurred prior to the law's enactment in 1994 may be charged as strikes, *People v. Kinsey*, 40 Cal.App.4th 1621, 1631 (1995), as may a defendant's equivalent convictions in another jurisdiction, California Penal Code section 667(d)(2), and certain juvenile convictions, California Penal Code section 667(d)(3);

6. There is no "washout" period after which prior qualifying convictions will no longer be counted as strikes. *People v. Martinez*, 71 Cal.App.4th 1502, 1514 & n.9 (1999) (citing Cal. Penal Code § 1170.12(a)(3)); and,

7. Defendants with prior strikes who are convicted of current multiple felonies committed on different occasions must serve consecutive sentences. Cal. Penal Code § 667(c)(6).

As of March 31, 2002, 31,651 defendants were serving sentences that had been doubled for "second strike" offenses, and 7,167 defendants were serving "third strike" sentences of at least twenty-five years to life. Cal. Dep't of Corrections, *Second and Third Strikers in the Institutional Population* (March 31, 2002), *at* http://www.cdc.state.ca.us/pdf/strike0302.pdf. Although 3,193 three-strikers were sentenced for crimes against persons, 2,158 were sentenced to twenty-five years to life for property crimes, including grand theft (108), petty theft with a prior (344), vehicle theft (217), receiving stolen property (164), forgery (58), and second degree burglary (455), *id.*, all of which are wobblers.[12]

[12] *See* Cal. Penal Code § 489 (grand theft); *id.* § 666 (petty theft with a prior); Cal. Vehicle Code § 10851 (auto theft); Cal. Penal Code § 496 (receiving stolen property); *id.* § 473 (forgery); *id.* § 461 (second degree burglary).

II. A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR TWENTY-FIVE YEARS FOR SHOPLIFTING THREE GOLF CLUBS RAISES AN INFERENCE OF GROSS DISPROPORTIONALITY

1. An inference of gross disproportionality arises in circumstances where both the "gravity" of the offense is slight and the "harshness of the penalty" is severe. *Helm*, 463 U.S. at 291-292; *see also Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Each of these factors is plainly present here. Mr. Ewing's offense is not a serious crime. His punishment, in contrast, is one of the most severe the state can impose. His sentence thus raises an inference of gross disproportionality.

A. The Gravity of the Offense

Mr. Ewing shoplifted three golf clubs and was caught immediately. This conduct was criminal in nature, to be sure, and warrants criminal sanctions. But, by any measure, his offense falls among the least serious of crimes. Mr. Ewing's offense was not a violent one. He did not use or threaten force against any person. His was solely a property crime that did not create the risk of, or result in, bodily injury to any person. *See Helm*, 463 U.S. at 292-93 ("nonviolent crimes are less serious than crimes marked by violence or the threat of violence").

The value of the three golf clubs, although sufficient to result in a grand theft charge, was relatively small. Under an objective standard, shoplifting three golf clubs is substantially less serious than the stealing of large amounts of money or defrauding someone of their valuable property. *See Helm*, 463 U.S. at 293, 296 (noting that the "absolute magnitude" of an offense is an objective consideration relevant to determining its gravity).

Nor did Mr. Ewing's shoplifting offense threaten ongoing social harm or provide fuel for significant additional criminal activity, as do crimes involving distribution of controlled substances. Such offenses are serious because of the "momentous" threat that drug distribution and use poses to both the individual and society. *See Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring). Although shoplifting may be an on-going concern for proprietors, the monetary losses that result do not create the same irreparable harm to our society that attends drug distribution offenses.

The California Legislature itself has plainly expressed its judgment that Mr. Ewing's theft offense is among the least serious in the state. Under the California Penal Code, Mr. Ewing's offense—grand theft—need not be treated as a felony; it is a "wobbler," treatable either as a misdemeanor or a felony. Cal. Penal Code § 489(b); *Douglas*, 79 Cal.App.4th at 813. Thus, the Legislature has decided that grand theft is not, in itself, among the group of criminal offenses that are sufficiently serious to warrant felony treatment in all instances.[13]

California's Three Strikes law expressly enumerates the subset of felonies that the state considers "serious" or

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[13] The record in this case also reflects the fact that the reason Mr. Ewing's offense was treated as a felony was because of his prior criminal record. *See* Pet. App. 1 at 4-5; JA 14. In this fashion, Mr. Ewing's past conduct was used twice against him. First, it was used to justify treating his wobbler offense, otherwise a misdemeanor, as a felony. Second, it was used to increase his punishment from a maximum sentence of three years (with possibility of parole after eighteen months) to a Three Strikes sentence of life imprisonment without possibility of parole for at least twenty-five years. The use of a single aggravating factor, recidivism, to justify a life sentence for what would otherwise be misdemeanor conduct, by itself, raises an inference of gross disproportionality. *Cf. Riggs v. California*, 525 U.S. 1114, 119 S. Ct. 890, 891-92 (1999) (Stevens, J., respecting denial of certiorari) (noting constitutional question raised "when the State 'double counts' the defendant's recidivism").

"violent" enough to count as "strikes." *See* Cal. Penal Code §§ 667, 667.5, 1192.7. As could be expected, the list includes the most serious of crimes, such as murder, attempted murder, kidnapping, and assault with a deadly weapon. Cal. Penal Code §§ 667.5(c)(1), (12), (14), 1192.7(c)(1), (9), (20), (31). Also on the list are crimes such as robbery and residential burglary. Cal. Penal Code §§ 667.5(c)(9), 1192.7(c)(18), (19). Conspicuously absent from the list, however, is grand theft.

Moreover, recognizing grand theft's modest placement on the spectrum of crimes, the state has established a low sentencing range for the offense (absent application of the Three Strikes law). Misdemeanor grand theft may be punished by no more than one year in county jail and a $1,000 fine. Cal. Penal Code §§ 489(b), 672. Felony grand theft may be punished by placement on probation, or by sixteen months, two years, or three years imprisonment. When the sentencing court elects imprisonment, the two-year sentence is designated the norm, and three years may be imposed only if aggravating circumstances are present. Cal. Penal Code §§ 18, 489(b), 672, 1170(b); Cal. Rule Court 420(a) (West 1999) (renumbered 2001).

B. The Harshness of the Penalty

Mr. Ewing has received one of the state's most severe punishments for committing an offense that the state has recognized as among the least serious. He will serve at least twenty-five years in prison because, no matter how exemplary his conduct in prison, "good time" credits may not be used to reduce his minimum term below twenty-five years, *see Cervera*, 24 Cal.4th at 1080, and he may be required to remain in prison for the rest of his life—for shoplifting.

Not only is Mr. Ewing's twenty-five-year minimum term exceptionally long—more than twice as long as the term

imposed on the defendant in *Rummel*[14]—his prospects for release thereafter are uncertain. Assuming Mr. Ewing lives to complete his minimum term of twenty-five years, to obtain parole he would need to negotiate the parole procedures of the California Board of Prison Terms. *See* Cal. Penal Code § 3041(a) (West 2000), Cal. Code Regs. tit. 15, §§ 2269, 2269.1, 2281, 2410 (2001). If the Board of Prison Terms, in its unreviewable discretion, concludes that Mr. Ewing's criminal history, social history, behavior before and after the crime, attitude toward his crime, or behavior in prison render him unsuitable for parole, Mr. Ewing can spend the rest of his life in prison. *See* Cal. Code Regs. tit. 15, § 2281.[15] By any objective standard, then, Mr. Ewing's sentence of life imprisonment with no possibility of parole for at least twenty-five years is extraordinarily severe.

Mr. Ewing's sentence is indeed far more severe than the sentence upheld in *Rummel*. In that case, the maximum sentence Texas provided for the defendant's current offense of obtaining money by false pretenses was ten years. Under the state's recidivist law, his sentence was increased to life imprisonment with the possibility of parole after ten to twelve years. The recidivism enhancement effectively turned a ten-year maximum sentence into a ten-year minimum sentence. California's Three Strike law, by contrast, turned Mr. Ewing's three-year maximum sentence into a twenty-five year minimum sentence.

In sum, it is abundantly clear, both from the inherently non-violent nature and small scale of Mr. Ewing's property

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[14] "Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years." *Helm*, 463 U.S. at 302.

[15] Even if the Board grants parole, the state constitution authorizes the governor to modify or reverse the Board's decision. Cal. Const. art. V, § 8.

crime, and from California's own statutory treatment of that crime, that Mr. Ewing's offense is at the least serious end of the spectrum. By contrast, his sentence lies at the most serious end of the spectrum, a place reserved in California for only those who commit the most violent and reprehensible crimes, such as first degree murder. *See* Cal. Penal Code §§ 190(a), 190.2 (West 2000). A comparison of the crime and the sentence thus raises an inference of gross disproportionality.

2. The remaining threshold consideration is whether the state's interest in enhancing punishment for habitual offenders can rebut the inference of gross disproportionality. The state's only justification for the extraordinary severity of Mr. Ewing's sentence is his recidivism. Mr. Ewing had suffered four prior convictions that qualified as "strikes" under the California law: three burglaries, two of which were non-violent, and a third where he brandished a knife and was also charged with a robbery. All four offenses were prosecuted in the same proceeding, and he received a single sentence of imprisonment.[16] 445 U.S. at 278.

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[16] In *Rummel*, by contrast, the defendant had been sentenced to separate prison terms for his prior convictions, as this Court emphasized in upholding Rummel's sentence:

> [U]nder Art. 63, a three-time felon receives a mandatory life sentence, with possibility of parole, only if commission and conviction of each succeeding felony followed conviction for the preceding one, and only if each prior conviction was followed by actual imprisonment. Given this necessary sequence, a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail.

445 U.S. at 278.

This Court has long recognized that a state "is justified in punishing a recidivist more severely than it punishes a first offender." *Helm*, 463 U.S. at 296; *accord Rummel*, 445 U.S. at 276. This is because "repetition of criminal conduct aggravates [the offenders'] guilt and justifies heavier penalties when they are again convicted." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912); *see also Witte v. United States*, 515 U.S. 389, 399 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as a 'stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one,'" *quoting Gryger v. Burke*, 334 U.S. 728, 732 (1948)). As a result, the State of California may, consistent with the Eighth Amendment, view Mr. Ewing's recidivism as an aggravating factor, and may impose a more severe sentence on him than on a first-time offender.

Recidivism does not, however, provide the state with a blank check to add any enhancement it chooses. Regardless of the defendant's prior crimes, the focus of constitutional inquiry must remain on the current, not past, criminal conduct. *Helm*, 463 U.S. at 290 ("a criminal sentence must be proportionate to the crime for which the defendant has been convicted"). In *Helm*, notwithstanding the defendant's six prior felony convictions, including three for burglary, this Court insisted that the reviewing court "must focus on the principal felony—the felony that triggers the life sentence—since [the defendant] already has paid the penalty for each of his prior offenses." *Id.* at 296 n.21.

Thus, California may consider Mr. Ewing's prior convictions as increasing the gravity of his shoplifting offense. It may enhance his punishment to reflect the increased culpability of a recidivist. California may not, however, impose

an enhanced sentence that is grossly disproportionate to his current offense of shoplifting by a recidivist.

It is important to recognize the degree to which Mr. Ewing's sentence has been increased, because of his prior record, beyond the sentence he would otherwise have faced. A first-time offender who shoplifted three golf clubs would very likely be treated as a misdemeanant by the prosecutor or the sentencing judge, and as such would face a maximum sentence of one year in the county jail. Mr. Ewing's minimum sentence is twenty-five times greater than that maximum.

If treated as a felon and not placed on probation, Mr. Ewing's sentencing range would be sixteen months, two years, or three years in state prison. Where the statute specifies three possible prison terms, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Cal. Penal Code § 1170(b); *see also* Cal. Rule Court 420(a) (West 1999) (renumbered 2001). A first-time offender who shoplifted three golf clubs, if sentenced as a felon, would likely receive a low-term sentence of sixteen months because of the absence of aggravating circumstances and the presence of at least one mitigating circumstance.[17] That sentence could be reduced by one-half through good-time credits, to only eight months in prison, making his Three-Strike minimum term nineteen times greater than the time he would actually serve.

Even if Mr. Ewing's prior record were taken into account and he was sentenced as a felon to the aggravated maximum term of three years, that term would also be reducible by one-

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[17] The California Rules of Court specify circumstances in aggravation (Rule 421), and circumstances in mitigation (Rule 423). None of the aggravating factors would apply to a first-time shoplifter, but the fact that "[t]he defendant has no prior record" (Rule 423(b)(1)) serves as a factor in mitigation.

half. His Three-Strikes minimum sentence is sixteen and two-thirds times greater than the time he would actually serve on that recidivist-enhanced sentence.

The enhancement for recidivism in the Three Strikes law is also disproportionate when compared to enhancements California prescribes for other, at least equally serious, aggravating factors. For example, committing a crime while armed with a firearm may be the basis for a sentencing enhancement of one year, Cal. Penal Code § 12022(a); using a deadly or dangerous weapon during a crime also warrants a one-year enhancement, Cal. Penal Code § 12022(b)(1); and personally inflicting great bodily injury in the commission of a felony merits a three-year enhancement, Cal. Penal Code § 12022.7(a). The perverse result is that California imposes a far greater sentence for grand theft with a criminal past than it does for grand theft while armed with a loaded gun, using a knife, or inflicting great bodily injury on a victim.

Furthermore, this enhancement of Mr. Ewing's sentence for shoplifting is grossly disproportionate to the sentence he received for the prior crimes that are the basis for the enhancement. For the prior strikes themselves, Mr. Ewing had previously received a sentence of nine years, eight months. This was the maximum available sentence and was reducible by one-half through good conduct and work credits. The state could not, consistent with the Double Jeopardy Clause, punish Mr. Ewing again for these prior strikes. *See, e.g., Brown*, 432 U.S. at 169-70. Under the Three Strikes law, however, the same crimes were used to enhance his sentence to life, with an absolute twenty-five-year minimum before he could even be considered for parole, regardless of his good conduct in prison. Thus, his prior serious crimes were used to impose an enhanced minimum sentence for the current non-serious crime that is more than two-and-a-half times his actual sentence for the prior serious crimes themselves.

3. These considerations illustrate a critical defect in California's Three Strikes law. The law produces a grossly disproportionate sentence in Mr. Ewing's case because it imposes a mandatory minimum term of twenty-five years on all defendants with two prior "strikes" who are convicted of a subsequent felony, regardless of the severity of that third felony. In this regard, the Three Strikes law is at odds with California's stated purpose of sentencing. *See* Penal Code § 1170(a)(1) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by *terms proportionate to the seriousness of the offense* with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances") (emphasis added). The Three Strikes law, however, imposes a "one size fits all" sentence of at least twenty-five years that is unrelated to the seriousness of the current offense.

Another anomaly of the Three Strikes law is that it establishes different penalty structures, depending not only on whether the defendant commits a "strike offense" but also when that offense occurs in a particular career. Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* 9 (2001). Consider a defendant convicted of burglary (a "serious offense" and thus a strike), robbery (a "violent offense" and thus a strike), and grand theft (neither a serious nor a violent offense). If that defendant were convicted of the robbery first, the burglary next, and then the grand theft, he would be deemed a three-striker and would be sentenced to twenty-five years to life. However, if he committed the grand theft first, and then the burglary and the robbery, he would be treated as a two-striker, and he would receive a sentence of only twice the normal sentence for his current robbery offense. In other words, the defendant whose criminal

activity was de-escalating from violent and serious offenses would receive a harsher sentence than the defendant whose crimes were becoming more serious and violent.

In sum, Mr. Ewing's penalty is grossly disproportionate even when the state's interest in punishing a recidivist more harshly is considered. Like the petitioner in *Helm*, Mr. Ewing "received the penultimate sentence for relatively minor criminal conduct." 463 U.S. at 303.

III. AN INTRAJURISDICTIONAL EVALUATION OF CALIFORNIA'S SENTENCING PROVISIONS CONFIRMS THAT MR. EWING'S SENTENCE IS GROSSLY DISPROPORTIONATE TO HIS OFFENSE

This Court has recognized that, to "validate" a finding of gross disproportionality in sentencing (*Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)), it "may be helpful to consider the sentences that could be imposed on other criminals in the same jurisdiction." *Helm*, 463 U.S. at 291. For example, in *Helm*, this Court considered the other crimes for which South Dakota imposed a life sentence for first-time offenders, and noted that such a sentence was authorized only for those who had committed the most serious, violent crimes. *Id.* at 298. The Court also noted that the Legislature had provided for substantially less harsh sentences than Helm's for many crimes that were far more serious than his. *Id.* Finally, the Court considered the state's other sentencing laws, and noted that the life sentence imposed for any three prior convictions, "regardless of the crimes," was comparable only to the enhancements for a second or third conviction for the most serious, violent crimes. *Id.* This "intrajurisdictional" analysis (*Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)) thus supported the Court's conclusion that Helm had received an unconstitutionally disproportionate sentence, because it showed that "Helm has been treated in the same

manner as, or more severely than, criminals who have committed far more serious crimes." *Helm*, 463 U.S. at 299. *See also Weems*, 217 U.S. at 380-381 (supporting its finding of gross disproportionality with "an impressive list of more serious crimes that were subject to less serious penalties").

A similar intrajurisdictional analysis here confirms the gross disproportionality of Mr. Ewing's sentence. First, just like the sentence invalidated in *Helm*, Mr. Ewing's sentence for shoplifting is comparable in severity only to the sentences that California otherwise reserves for those who have committed the most serious, violent crimes. California imposes only two sentences more severe than the sentence Mr. Ewing received: (1) death; and (2) life imprisonment without possibility of parole. *Cf. Weems*, 217 U.S. at 363-364 (noting that "there are only two degrees of punishment higher in scale than *cadena temporal*—death, and *cadena perpetua*").

To receive a sentence in California equal to or more severe than Mr. Ewing's for reasons other than recidivism, an individual would have to commit one of a handful of the most violent, socially destructive, and/or morally reprehensible crimes that had resulted in or threatened great bodily injury or death. For example, California imposes a sentence of twenty-five years to life, or greater, for: murder in the first degree (Cal. Penal Code § 190(a)); second degree murder where the defendant has served a prior prison term for murder (§ 190.05); murder in the second degree where defendant knew the victim was a peace officer engaged in the performance of his or her duties (§ 190(b)); treason (§ 37); procurement of the execution of an innocent person by willful perjury or subornation of perjury (§ 128); intentional train wrecking where death results (§ 218-219); assault by a person serving a life sentence, with a deadly weapon or by means likely to produce great bodily injury (§ 4500); kidnapping for ransom during which the victim dies, suffers bodily harm, or

was confined in a manner likely to cause death (§ 209(a)); and willfully and maliciously exploding a destructive device, which causes the death of any person (§ 12310(a)(1)).

Second, it is also the case here, as it was in *Helm* and *Weems*, that the state punishes many crimes that are far more serious than Mr. Ewing's with sentences that are far less harsh. Thus, for many extremely violent or serious crimes, California imposes a sentence of life imprisonment *with* possibility of parole and no specified minimum term, which renders the defendant eligible for parole in as few as seven years (Cal. Penal Code § 3046(a)). These crimes include: aggravated mayhem (§ 205); torture (§ 206.1); kidnapping for ransom (§ 209(a)); kidnapping to commit robbery or a sex offense (§ 209(b)); kidnapping during a carjacking (§ 209.5); train derailing or wrecking in which no person dies (§ 219); igniting an explosive or destructive device with intent to commit murder or that causes great bodily injury to any person (§§ 12308, 12310(b)); and using a weapon of mass destruction that may cause widespread, disabling illness, or injury in human beings (§ 11418(b)(1)). Thus, for example, if a person with no criminal past had entered the golf pro shop the day after Mr. Ewing did, and was later convicted of detonating a bomb with the intent to kill the clerk or of kidnapping the clerk to rob him, that person would be eligible for parole after seven years, nearly two decades before Mr. Ewing would be parole-eligible for his shoplifting offense.

Third, again as in *Helm*, the California Three Strikes law imposes penalties far more severe and disproportionate than do California's other recidivist statutes. *See Helm*, 463 U.S. at 298 (comparing Helm's life sentence to sentences that could be imposed under South Dakota's recidivist laws for more serious offenses). California's other habitual offender laws generally are based on the sentence otherwise available for the current offense, thus maintaining a degree of proportionality. Some California laws punish recidivists by

adding to the sentence a term of one to five years. *See, e.g.*, Cal. Health & Safety Code § 11370.2 (three-year enhancement for a specified drug offense with a prior specified drug conviction); Cal. Penal Code § 667(a) (five-year enhancement for any prior serious felony conviction upon conviction of a subsequent serious felony); Cal. Penal Code § 667.6(a) (five-year enhancement for conviction of a specified sex offense with a prior conviction of a specified sex offense); *see also* Cal. Penal Code § 666.7 (listing enhancements). Even under its Three Strikes law, California punishes a "second striker" (a person convicted of a felony with a prior conviction for a serious or violent felony) by doubling the sentence otherwise imposed for the new offense. Cal. Penal Code § 667(e)(1). Thus, other California recidivism provisions, while enhancing the punishment for the current offense because of the defendant's prior crimes, maintain a discernable proportional relationship between the relative gravity of the offense being punished and the sentence imposed.

California's Three Strikes law is different. Although the third offense must be a felony, the law does not take into account the fact that the third felony itself may not be serious by California standards. Unlike California's other enhancements for recidivism, the twenty-five-year mandatory term of imprisonment under the Three Strikes law operates in a manner wholly untethered to the current offense. Such a "one size fits all" sentencing provision "raises serious doubts about the proportionality of the sentence applied to the least harmful offender." *Rummel*, 445 U.S. at 301 (Powell, J., dissenting).

In sum, Mr. Ewing's life sentence for shoplifting, as aggravated by his prior convictions, is far more severe than the punishments that the state imposes for many violent and serious crimes, and is comparable only to the punishments imposed for the most extraordinarily serious crimes. In all other contexts California imposes enhancements for recid-

ivism that are related in some recognizable fashion to the underlying offense and are far less severe than the enhancement imposed here. Because Mr. Ewing "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes," *Helm*, 463 U.S. at 299, and because the enhancement for recidivism in his case is completely out of proportion both to the crime for which he is being sentenced, and to the enhancements for recidivism that the state imposes in other contexts, an intrajurisdictional analysis vividly underscores the gross disproportionality of Mr. Ewing's life sentence.

IV. AN INTERJURISDICTIONAL EVALUATION OF MR. EWING'S SENTENCE FURTHER CONFIRMS ITS GROSS DISPROPORTIONALITY

Just as the intrajurisdictional comparison of sentences demonstrates the gross disproportionality of Mr. Ewing's sentence, an interjurisdictional comparison of "the sentences imposed for commission of the same crime in other jurisdictions" reinforces the conclusion that his California sentence is grossly disproportionate to his offense. *Helm*, 463 U.S. at 291. No other state in the Union today would subject a person in Mr. Ewing's circumstances to a sentence as harsh as a mandatory minimum sentence of twenty-five years to life.

A No Life Sentence in Forty-Six Other Jurisdictions.

To begin with, in forty-three of the states, the District of Columbia, the federal courts, and the military courts Mr. Ewing could not have received a life sentence at all. The vast majority of other jurisdictions thus impose a qualitatively less severe sentence than does California. This is true of the laws both as they stood at the time of Mr. Ewing's shoplifting

offense, and as they stand today. *See* Appendix 2.[18] In thirty-three states, Mr. Ewing's punishment would have fallen within a range of one to ten years.[19] Thus, in these thirty-three states, the *maximum* sentence he could receive would be only forty percent of his *minimum* twenty-five year sentence under the California Three Strikes law.

Mr. Ewing's sentence would have been even less if convicted under federal law. Under the United States Sentencing Commission Sentencing Guidelines, his sentencing range would have been six to twelve months, or twelve to

[18] Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *See* Appendix 2 (summarizing the applicable statutes for each state).

[19] Alaska (not more than five years), Arizona (four to six years), Connecticut (one to ten years), Delaware (not more than two years), District of Columbia (not more than ten years), Florida (not more than ten years), Georgia (ten years), Hawaii (twenty months), Idaho (not more than one year), Illinois (two to five years), Indiana (sixteen months), Iowa (three to five years), Kansas (nine to eleven months), Kentucky (five to ten years), Maine (less than one year), Massachusetts (not more than five years), Minnesota (not more than five years), Mississippi (not more than five years), Nebraska (not more than five years), New Jersey (not more than six months), New Mexico (18 months), New York (three to four years), North Carolina (one year to thirty months), North Dakota (not more than ten years), Ohio (six to twelve months), Oregon (not more than five years), Pennsylvania (not more than five years), Rhode Island (not more than 10 years), South Carolina (not more than five years), Tennessee (four to eight years), Utah (not more than five years), Washington (not more than five years), West Virginia (not more than sixty days), and Wyoming (not more than ten years). *See* Appendix 2.

eighteen months, depending on whether he pleaded guilty or went to trial.[20]

If Mr. Ewing had been a member of the armed services and thus subject to the Uniform Code of Military Justice, his maximum sentence for violating 10 U.S.C. § 921 (Article 121 of the U.C.M.J.) would have been five years confinement. *See* Manual for Courts-Martial, Appendix 12. There is no general recidivist provision in the Uniform Code.

Notably, there would be no significant difference in the punishment that Mr. Ewing would receive in these other jurisdictions, regardless of whether the jurisdiction had a recidivist law that would apply. In twenty-four states, the District of Columbia, and the federal courts, Mr. Ewing could not have been sentenced as a recidivist for his shoplifting offense,[21] either because (1) his current offense would not trigger application of the recidivist statute,[22] (2) the state's

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[20]If Mr. Ewing pleaded guilty in federal court to stealing federal property, in violation of 18 U.S.C. § 641, his guideline range would have been six to twelve months, determined as follows: base offense level of four, U.S.S.G. § 2B1.1(a) (2000) (amended 2001), plus two levels for loss of more than $1,000, *id.* § 2B1.1(b)(1)(C), minus two levels for acceptance of responsibility, *id.* § 3E1.1(a), for a total adjusted offense level of four, and a criminal history category of VI. Even if Mr. Ewing went to trial in federal court, thereby losing his acceptance of responsibility adjustment, his guideline range would have been twelve to eighteen months. He would not be subject to the federal three-strike law, *see* 18 U.S.C. § 3559(c) (West 2000), or to enhancement of his sentence as a career offender, *see* U.S.S.G. § 4B1.1 (2000).

[21] Delaware, District of Columbia, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming. Ohio and Oregon have no general recidivist statute, and Kansas' recidivist statute does not apply to felonies committed after July 1, 1993. *See* Kan. Stat. Ann. § 21-4504(e)(3) (2001).

[22] *See* Me. Rev. Stat. Ann. tit. 17-A, § 1252(4-A) (West Supp. 2001); Minn. Stat. Ann. § 609.1095, subd. 2 (West Supp. 2002); 42 Pa. Cons.

recidivist statute requires that qualifying priors arise out of separate proceedings,[23] or both.[24] Of these twenty-four states, nineteen would permit a sentence of no greater than five years for Mr. Ewing's offense.[25]

Stat. § 9714(A)(1) (West 1998); S.C. Code Ann. § 17-25-45(A),(B),(C)(1) & (2) (Supp. 2001); Utah Code Ann. § 76-3-203(b), (c)(i) (Supp. 2001); W. Va. Code § 61-11-18(a) (Michie 2000).

[23] *See* Del. Code Ann. tit. 11, § 4214 (2001); *Buckingham v. State*, 482 A.2d 327, 330 (Del. 1984); D.C. Code Ann. § 22-104a(c)(1)(repealed June 8, 2001) (current version at D.C. Code Ann. § 22-1804a(c)(1) (2002)); Idaho Code § 19-2514 (Michie 1997), *State v. Harrington*, 133 Idaho 563, 990 P.2d 144, 146 (Idaho Ct. App. 1999); Mass. Gen. Ann. Laws ch. 279, § 25 (West 1998), *Commonwealth v. Hall*, 397 Mass. 466, 492 N.E.2d 84, 86 (1986); Neb. Rev. Stat. § 29-2221(1)(1995); N.H. Rev. Stat. Ann. § 651:6(I)(c)(1996); N.J. Stat. Ann. § 2C [illegible](a) (West Supp. 2001); N.C. Gen. Stat. § 14-7.1 (1999); R.I. Gen. Laws § 12-19-21(a) (2000).

[24] *See* 18 U.S.C. § 3559(c)(West 2000); Ill. Comp. Stat. § 5/33B-1(a), (d)(3) & (4) (West 1993); Ind. Code Ann. § 35-50-2-8(b)(1), (c)(1) (Michie 1998) (amended 2001); Md. Ann. Code art. 27, § 643B(a), (c) (Supp. 2001); Miss. Code Ann. §§ 99-19-81, 99-19-83 (2000); Va. Code Ann. § 19.2-297.1(A) (Michie 2000); Wash. Rev. Code Ann. §§ 9.94A.030(28), (32)(a)(i),(ii); 9.94A.570 (West 2001); Wyo. Stat. Ann. § 6-10-201(a)(i) & (ii) (Michie 2001).

[25] Delaware (not more than two years), Idaho (not more than one year), Illinois (two to five years), Indiana (eighteen months), Kansas (nine to eleven months), Maine (less than one year), Massachusetts (not more than five years), Minnesota (not more than five years), Mississippi (not more than five years), New Jersey (not more than six months), Nebraska (not more than five years), North Carolina (one year to thirty months), Ohio (six to twelve months), Oregon (not more than five years), Pennsylvania (not more than one year), South Carolina (not more than five years), Utah (not more than five years), Washington (not more than five years), and West Virginia (not more than sixty days). *See* Appendix 2.

In a few of the states where the recidivist provisions are inapplicable, the general sentencing provisions establish a wide sentencing range within which the judge can sentence the defendant. For example, in Virginia the range is from one to twenty years, Va. Code Ann. § 18.2-95 (Michie

Similarly, in nearly all of the states that would have permitted sentencing Mr. Ewing under a recidivist statute, he still would not have been subject to a mandatory sentence remotely approaching what he received in California. In nineteen of the twenty-five states in which Mr. Ewing's record could have triggered sentencing under a recidivist statute, a defendant with Mr. Ewing's record could not have received a life sentence at all.[26] Aside from the one-hundred year maximum sentence permitted in Montana, which provides for a minimum sentence of just five years, the maximum sentence he might have received in any of these nineteen states is twenty years.[27] Moreover, five of these states require no minimum sentence at all.[28]

B. Less Severe Sentences in the Remaining States

Of the six remaining states, two would no longer impose a sentence as severe as the life sentence that could have been imposed at the time of Mr. Ewing's shoplifting offense. Three of the remaining states would permit a court, in

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Supp. 2001), but the actual sentence for a person with Mr. Ewing's prior record would likely be from two years, one month, to five years, three months, the discretionary guideline range established by the Virginia Sentencing Commission. *See id.* § 19.2-298.01.

[26] Alaska (presumptive term of three years), Arizona (presumptive term of five years), Arkansas (three to twenty years), Colorado (four to twelve years), Connecticut (one to ten years), Florida (not more than ten years), Georgia (ten years), Hawaii (twenty months), Iowa (three to five years), Kentucky (five to ten years), Michigan (not more than fifteen years), Missouri (not more than twenty years), Montana (five to one hundred years), New Mexico (thirty months), New York (three to four years), North Dakota (not more than ten years), Tennessee (four to eight years), Texas (two to twenty years), and Wisconsin (not more than eleven years). *See* Appendix 2.

[27] Arkansas, Missouri, and Texas. *See* Appendix 2.

[28] Florida, Michigan, Missouri, North Dakota, and Wisconsin. *See* Appendix 2.

principle, to impose a life sentence. But none of these states couple that sentence with a minimum term of anywhere near twenty-five years. To the contrary, they permit parole far earlier—anywhere from a minimum of ten years to no minimum at all.

1. *Louisiana*

Under the state law that currently prevails in Louisiana, Mr. Ewing would not face a life sentence, although such a sentence would have been available under the law as it stood at the time of his offense. *See Atkins*, No. 00-8452, 536 U.S. ___, slip op. at 6 ("[a] claim that punishment is excessive is judged . . . by the standards that . . . currently prevail"); *id.* at 17 (construing and applying the Eighth Amendment in the light of "evolving standards of decency"). Under the current Louisiana habitual offender statute, a defendant must have at least three prior violent felony convictions to be eligible for a life sentence for grand theft. La. Rev. Stat. Ann. § 15:529.1(A)(1)(b)(ii) (West Supp. 2001) (as amended 2001). Because Mr. Ewing has only one prior violent felony conviction under Louisiana law, he would not be eligible today for life without parole, but would instead face a sentence of six-and-two-thirds to twenty years. *See* La. Rev. Stat. § 15:529.1(A)(1)(b)(i) & (D)(2) (West Supp. 2001).[29]

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[29] Under Louisiana's habitual offender law as it stood at the time of Mr. Ewing's shoplifting offense, courts had the authority to impose a sentence of life without the possibility of parole. *See* La. Rev. Stat. Ann. § 15:529.1(A)(1)(b)(ii) & (c)(ii) (West 2000), amended by 2001 La. Sess. Law Serv. 403 (West). Even so, Mr. Ewing's sentence would have been subject to attack as excessive under the Louisiana Constitution. A Louisiana court must depart downward from the minimum habitual offender sentence if it finds by clear and convincing evidence that the sentence is excessive in a given case. *See State v. Lindsey*, 770 So. 2d 339, 343-44 (La. 2000). Under the old habitual offender law, Louisiana courts carefully scrutinized sentences of life imprisonment when imposed for a relatively minor offense, and invalidated them where excessive. *See,*

2. *Oklahoma*

Like Louisiana, Oklahoma has recently amended its recidivist statute to provide that the current offense triggering a life sentence must be a violent felony. Under current Oklahoma law, Mr. Ewing would face a sentence of just four years, up to life. *See* Okla. Stat. Ann. tit. 21, §§ 51.1(C) & 1704.[30]

3. *Alabama*

Alabama would not require a court to sentence Mr. Ewing to life imprisonment. Instead, the court would have had the option under Alabama's habitual offender law to sentence a defendant to either life imprisonment or a term of not less than twenty years on conviction of a Class B felony. Ala. Code § 13A-5-9(c)(2) (Supp. 2001). Moreover, Mr. Ewing would be eligible for parole in as few as six years, four months, if he were to receive a twenty year sentence in Alabama, and no more than ten years if he were sentenced to life. *Id.* § 15-22-28(e). He could be paroled even earlier by a unanimous vote of the Board of Pardons and Paroles. *Ibid.*

4. *South Dakota*

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e.g., State v. Hayes, 739 So. 2d 301, 303-04 (La. Ct. App. 1999) (defendant, who stole $1,000 and was sentenced to life without parole under the habitual offender law, "is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case"); *State v. Burns*, 723 So. 2d 1013, 1019-20 (La. Ct. App. 1998) (life without possibility of parole sentence excessive for relatively minor drug crimes).

[30] At the time of his shoplifting offense, Mr. Ewing would have been subject to a sentence of not less than twenty years. Okla. Stat. Ann. tit. 21, § 51.1(B) (West Supp. 2000) (amended 2001). He would nevertheless have been eligible for parole after serving one-third of the sentence—six years, eight months. Okla. Stat. Ann. tit. 57, § 332.7(B). *See Rummel*, 445 U.S. at 280 (taking into account Texas's "relatively liberal" parole policies under which prisoner serving life sentence would become eligible for parole "in as little as 12 years").

In South Dakota, while Mr. Ewing would have been subject to a sentence of up to life imprisonment, there would be no mandatory minimum term. *See* S.D. Codified Laws § 22-7-8 (Michie 2001). Mr. Ewing would even be eligible for probation. *Id.* § 23A-27-12.

5. *Vermont*

In Vermont, Mr. Ewing could have been sentenced to up to life imprisonment under the state's recidivist statute. *See* Vt. Stat. Ann. tit. 13, § 11 (2001). A life sentence would not, however, have been mandatory, and Mr. Ewing could have received a lesser sentence of not more than ten years. *Id.* § 2501; *State v. Angelucci*, 405 A.2d 33, 42 (Vt. 1979). Moreover, even if Mr. Ewing did receive a life sentence under Vermont law, he would have been eligible for parole within six *months* after he was committed to prison. Vt. Stat. Ann. tit. 13, § 501(1) (2000)(amended 2001); *State v. Battick*, 349 A.2d 221, 222 (Vt. 1975).

6. *Nevada*

Finally, Nevada would have permitted Mr. Ewing to be sentenced to life without parole. However, as this Court explained in *Helm*, a life sentence without parole is not mandatory, but rather discretionary with the court in Nevada. *Helm*, 463 U.S. at 300 (citing Nev. Rev. Stat. § 207.010(2) (1981)). A Nevada court could alternately impose a sentence of life *with* possibility of parole, in which case Mr. Ewing would be eligible for parole after serving just ten years in prison, substantially less than half the amount of time he will have to serve in California. *See id.* at 300 n.27 (citing Nev. Rev. Stat. § 207.010(2)).[31]

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[31] The Court further noted that it had not been advised that any defendant in Nevada whose prior offenses were as minor as Helm's had received life without parole. *Id.*

To summarize, in thirty-three states, Mr. Ewing's sentence would have fallen into the range of one to ten years. In only one state in the nation—Louisiana—could Mr. Ewing have faced a harsher mandatory sentence at the time of his sentencing, life without possibility of parole, but that result was found excessive by the Louisiana courts and has been superseded by legislation. In only five other states would Mr. Ewing be subject even to a discretionary life term, and the severity of such a sentence in those states is significantly mitigated by the availability of early parole or probation.[32]

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[32] In *Atkins*, this Court also noted that the sentencing practices of other countries were relevant to the Court's Eighth Amendment analysis, even if such practices were not conclusive. No. 00-8452, 536 U.S. ___, slip. op. at 11-12 n.21; *see also Thompson v. Oklahoma*, 478 U.S. 815, 830 n.31 (1988) (plurality opn.). Here, too, the practices of other countries prove instructive. For example, under the United Kingdom's Powers of Criminal Courts (Sentencing) Act, 2000, chapter 6, section 109, an offender who twice commits a "serious offence," as defined in the statute, faces a sentence of life imprisonment. Notably, however, "[a]ll offences identified as serious offences are offences for which life imprisonment could be imposed quite apart from [the recidivist statute]." *R. v. Offen*, [2000] 1 Crim. App. R. 24, 1 W.L.R. 253. In contrast, California's Three Strikes law imposes a life sentence regardless of the punishment that would otherwise be imposed for the triggering offense. Indeed, Mr. Ewing received a sentence of twenty-five years to life for a shoplifting offense that is, at most, punishable by three years imprisonment.

Moreover, in the United Kingdom, a court may impose a life sentence only where the offender poses a "significant risk to the public." *Id.* Mr. Ewing's shoplifting offense would not even trigger the United Kingdom's recidivist scheme, nor would his prior burglary and robbery convictions count as priors under the scheme.

Finally, international courts will scrutinize the nature of the offense being punished and strike down a sentence that is grossly disproportionate to that offense. *See id.* (concluding that even though the defendant robbed a store with a toy gun, he did not pose a significant risk to the public under the recidivist statute); *R. v. Smith*, [1987] 1 S.C.R. 1045, 1072 (concluding that a mandatory sentence of seven years imprisonment for a drug offense was cruel and unusual punishment in violation of section 12 of the Australian Charter); *Sillery v. The Queen*, [1981] 180 C.L.R. 353, 361 (concluding that a mandatory life sentence imposed for highjacking was cruel and unusual punishment because, as applied to less serious highjacking offenses, it was excessive and served no valid legislative purpose).

CONCLUSION

As *Helm* demonstrates, a state may not, consistent with the Eighth Amendment, impose a severe sentence, such as life in prison with a lengthy minimum term, upon a habitual offender who commits a minor crime. Although Mr. Ewing committed a simple shoplifting offense and had been previously imprisoned for felony conduct only once, he nevertheless received a sentence substantially more severe than that in *Rummel*—life with a minimum term of twenty-five years. Under the criteria for evaluating gross disproportionality established by this Court in *Helm* and *Harmelin*, Mr. Ewing's sentence is grossly disproportionate to his crime. The judgment below should therefore be vacated, and the case remanded for further proceedings, including resentencing.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Constitution, Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Article XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

California Penal Code § 17

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate

determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

California Penal Code § 18

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

California Penal Code § 489

Grand theft is punishable as follows:

(b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

California Penal Code § 654

(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

(b) Notwithstanding subdivision (a), a defendant sentenced pursuant to subdivision (a) shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation.

California Penal Code § 667

(a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction

consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled

and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two_thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

California Penal Code § 667.5

(c) For purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(6) Lewd acts on a child under the age of 14 years as defined in Section 288.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5, or 12022.55.

(9) Any robbery.

(10) Arson, in violation of subdivision (a) or (b) of Section 451.

(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(12) Attempted murder.

(13) A violation of Section 12308, 12309, or 12310.

(14) Kidnapping.

(15) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.

(16) Continuous sexual abuse of a child, in violation of Section 288.5.

(17) Carjacking, as defined in subdivision (a) of Section 215.

(18) A violation of Section 264.1.

(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.

(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.

(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.

(22) Any violation of Section 12022.53.

The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

California Penal Code § 1170.12

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one_fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a

prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).

California Penal Code § 1192.7

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by

force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; (28) any felony offense, which would also constitute a felony violation

of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or penetration by a foreign object in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) terrorist threats, in violation Section 422; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; and (41) any conspiracy to commit an offense described in this subdivision.

California Rule of Court 420

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are

included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

California Rule of Court 421

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

California Rule of Court 423

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or

parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.

APPENDIX B

Jurisdiction	Penalty For First Time Offender	Penalty For Recidivist Offender
Federal	6 to 12 months guidelines range, 10 year statutory maximum U.S.S.G. Ch. 5, Pt. A (2000); 18 U.S.C. § 641 (West 2000) value of the property stolen is equal to or exceeds $1,000 Class C felony 18 U.S.C. §§ 641, 3559(a)(3)	not applicable 18 U.S.C. § 3559(c) (West 2000); U.S.S.G. § 4131.1 (2000)
Alabama	2 to 20 years Ala. Code § 13A-5-6(a)(2) (Michie 2000) "theft of property which exceeds $1,000.00 in value" First degree theft Class B Felony *Id.* § 13A-8-3(a), (c)	life or any term of not less than 20 years Ala. Code § 13A-5-9(c)(2) (Supp. 2001)
Alaska	not more than 5 years Alaska Stat. § 12.55.125(e) (Michie 2001) "the value of the property . . . is $500 or more but less than $25,000" Second degree theft Class C felony *Id.* § 11.46.130(a)(1), (c)	presumptive term of 3 years Alaska Stat. § 12.55.125(e)(2) (Mitchie 2001)
Arizona	9 months to 2 years, 1 1/2 years presumptive term Ariz. Rev. Stat. § 13-701(A)(4), (C)(4) (2001) "theft of property . . . or services with a value of one thousand dollars or more but less than two thousand dollars" Class 5 felony *Id.* §13-1802(E)	4 to 6 years, 5 years presumptive Ariz. Rev. Stat. § 13-604(c) (2001)

Arkansas	3 to 10 years Ark. Code Ann. § 5-4-401(a)(4) (Michie 1997) the value of the property is less than two thousand five hundred dollars but more than five hundred dollars" Class C felony Id. § 5-36-103(b)(2)(A) (Michie Supp. 2001)	3-20 years Ark. Code Ann. § 5-4-501(a)(2)(D), (e)(1) (Michie Supp. 2001) (amended 2001); *Glick v. State*, 689 S.W.2d 559, 561 (1986)
Colorado	2 to 6 years Colo. Rev. Stat. Ann. § 18-1-105(1)(a)(V)(A) (West Supp. 2001) "the value of the thing involved is five hundred dollars or more but less than fifteen thousand dollars" Class 4 felony Id. § 18-4-401(2)(c) (West 1999)	4 to 12 years Colo. Rev. Stat. §§ 18-1-105(9)(a)(II) (West Supp. 2001); 16-13-101(1.5), (2) (West 1998); 18-1-105(9)(a)
Connecticut	1 to 5 years Conn. Gen. Stat. Ann. §53a-35a(7) (West 2001) "the value of the property ... exceeds one thousand dollars" *Id.* § 53a-124(a) Third degree larceny Class D felony *Id.* § 53a-124(c)	1 to 10 years Conn. Gen. Stat. Ann. §§ 53a-40(j); 53a-35a(6) (West 2001)
Delaware	not more than 2 years Del. Code Ann. tit. 11, § 4205 (2001) "goods . . . shoplifted are of the value of $1,000 or more" Class G felony *Id.* § 840(d) (2001)	not applicable Del. Code Ann. tit. 11, § 4214 (2001); Buckingham v. State, 482 A.2d 327, 330 (Del. 1984)

District of Columbia	not more than 10 years D.C. Code Ann. § 22-3812 (1995 Repl.) "the value of the property obtained . . . is $250 or more" First Degree Theft *Id.* § 22-3812	not applicable D.C. Code Ann. § 22-104a(c)(2) (2000 Repl.)
Florida	not more than 5 years Fla Stat. Ann. § 775.082(3)(d) (West 2000) "valued at $300 or more but less than $5,000" Third degree grand theft Third degree felony *Id.* § 812.014(c)(1)	not more than 10 years Fla. Stat. Ann. § 775.084(1)(a), (4)(a)(3) (West 2000) (amended 2000)
Georgia	County jail years Ga. Code Ann. §§ 16-8-2,16-8-12(a)(1), 17-10-3 (1999) "the property which was the subject of the theft exceeded $500.00 in value" Misdemeanor or felony *Id.* § 16-8-12(a)(1)	10 years Ga. Code Ann. § 17-10-7(a) (1997)
Hawaii	not more than 5 years Haw. Rev. Stat. Ann. §706-660 (Michie 1999) "property . . . the value of which exceeds $300" Second degree theft Class C felony *Id.* § 708-831(1)(b),(2)	20 months Haw. Rev. Stat. Ann. § 706-606.5(1)(a)(iv), (7)(a) (Michie 1999)

Idaho	not more than 1 year Idaho Code § 18-2408(3) (Michie 1997) "theft as defined in this chapter and . . . actions do not constitute grand theft [i.e., property obtained by extortion committed by instilling fear in victim]" *Id.* § 18-2407(2) (Michie Supp. 2001) Misdemeanor *Id.* § 18-2408(3)	not applicable Idaho Code § 19-2514 (Michie 1997); State v. Harrington, 133 Idaho 563, 990 P.2d 144, 146 (Idaho Ct. App. 1999)
Illinois	2 to 5 years 730 Ill. Comp. Stat. Ann. 5/5-8-1(6) (West Supp. 2002) "theft of property exceeding $300 and not exceeding $10,000 in value" Class 3 felony *Id.* 720, § 5/16-1(b)(4) (West 1993)	not applicable 720 Ill. Comp. Stat. § 5/33B-1(a) (West 1993)
Indiana	18 months Ind. Code Ann. § 35-50-2-7(a) (Michie 1998) "the fair market value of the property is at least one hundred thousand dollars" Class D felony *Id.* § 35-43-4-2(a)	not applicable Ind. Code Ann. § 35-50-2-8(b)(1), (c)(1) (Michie 1998) (amended 2001)
Iowa	not more than 5 years Iowa Code Ann. § 902.9(5) (West Supp. 2002) "property exceeding one thousand dollars but not exceeding ten thousand dollars in value" Second degree theft Class D felony *Id.* § 714.2(2) (West 1993)	3 to 5 years Iowa Code Ann. § 902.8 (West 1994)

Kansas	9 to 11 months Kan. Stat. Ann. § 21-4704(a) (2000) "theft of property the value of at least $500 but less than $25,000" Severity level 9 Nonperson felony *Id.* §21-3701(b)(2) (1995)	no general recidivist statute *See* Kan. Stat. Ann. § 21-4504(e)(3) (2001)
Kentucky	1 to 5 years Ky. Rev. Stat. Ann. § 532.060(2)(d) (Michie 1999) "the value of property is three hundred dollars or more" Id. § 514.030(2) (Michie Supp. 2001) Class D felony *Id.* § 532.060(2)(d)	5 to 10 years Ky. Rev. Stat. Ann. §§ 532.080(2), (5); § 532.060(2)(c) (Michie 1999)
Louisiana	not more than 10 years La. Rev. Stat. Ann. § 14:67.10(B)(1) (West 1997) "value of five hundred dollars or more" *Ibid.*	life without possibility of parole La. Rev. Stat. Ann. § 15:529.1(A)(1)(b)(ii) (West Supp. 2001) (amended 2001); id. §§ 14:2(4), (13)(y); 14:67.10
Maine	less than 1 year Me. Rev. Stat. Ann. tit. 17-A, § 1252(2)(D) (West Supp. 2001) "the value of the property is more than $1,000 but not more than $2,000" *Id.* § 353(5) (West 1983) Class D crime *Ibid.*	not applicable Me. Rev. Stat. Ann. Tit. 17-A, § 1252(4-A) (West Supp. 2001)

Maryland	not more than 15 years Md. Ann. Code art. 27, § 342(f)(1) (Supp. 2001) "the property . . . that was the subject of the theft has a value of $500 or greater" Felony *Ibid.*	not applicable Md. Ann. Code art. 27, § 643B (Supp. 2001)
Massachusetts	not more than 5 years Mass. Gen. Laws Ann. Ch. 266, § 30(1) (West 2000) "the value of property stolen exceeds two hundred and fifty dollars" *Ibid.*	not applicable Mass. Gen. Laws Ann. Ch. 279, § 25 (West 1998); *Commonwealth v. Hall*, 397 Mass. 466; 492 N.E.2d 84, 86 (1986)
Michigan	not more than 5 years Mich. Comp. Laws Ann. § 750.356(3)(a) (West Supp. 2001) "[t]he property stolen has a value of $1,000.00 or more but less than $20,000.00" Felony *Ibid.*	not more than 15 years Mich. Comp. Laws Ann. § 769.12(1)(b) (West 2000)
Minnesota	not more than 5 years Minn. Stat. Ann. § 609.52, subd. 3(3) (West Supp. 2002) "the value of the property . . . stolen is more than $500 but not more than $2,500" *Id.* § 609.52, subd. 3(3)(a)	not applicable Minn. Stat. Ann. § 609.1095, subd. 2 (West Supp. 2002)
Mississippi	not more than 5 years Miss. Code Ann. § 97-17-41(1)(a) (2000) "personal property of another[ ] of the value of Two Hundred Fifty Dollars or more" Grand larceny *Ibid.*	Not applicable Miss. Code Ann. § 99-19-81 (2000)

Missouri	not more than 7 years Mo. Rev. Stat. § 558.011(1)(3) (2000) "[t]he value of the property . . . appropriated is seven hundred fifty dollars or more" Class C felony *Id.* § 570.030(3)(1)	not more than 20 years Mo. Rev. Stat. § 558.016(7)(3) (2000)
Montana	not more than 10 years Mont. Code Ann. § 45-6-301(8)(b) (2001) "theft of property exceeding $1,000" *Ibid.*	5 to 100 years Mont. Code Ann. §§ 46-18-501, 46-18-502(1) (2001)
Nebraska	not more than 5 years Neb. Rev. Stat. § 28-105(1) (1995) "the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars" Class IV felony *Id.* § 28-518(2)	not applicable Neb. Rev. Stat. § 29-2221(1) (1995)
Nevada	1 to 5 years Nev. Rev. Stat. Ann. § 193.130(2)(c) (West 2001) "the value of the property . . . involved in the theft is $250 or more but less than $2,500 Category C felony *Id.* § 205.0835(3)	life without possibility of parole, life with the possibility of parole after 10 years, or 25 years with eligibility of parole after 10 years Nev. Rev. Stat. Ann. § 207.010(1)(b)(1), (2), (3) (West 2001)

New Hampshire	not more than 15 years N. H. Rev. Stat. Ann. § 651:2(11)(a) (1996) "value of the property . . . exceeds $1,000" Class A felony *Id.* § 637:11 (1)(a)	not applicable N.H. Rev. Stat. Ann. § 651:6(1)(c)
New Jersey	not more than 6 months N.J. Stat. Ann. §2C:43-8 (West 1995) Disorderly persons offense *Id.* § 2C:20-11(c) (West 1995) (amended 2000)	not applicable N.J. Stat. Ann. §§ 2C:44-3(a); 2C:44-4(c) (West Supp. 2001)
New Mexico	18 months N.M. Stat. Ann. § 31-18-15(A)(6) (Michie 2000) "value of the merchandise shoplifted . . . is more than two hundred fifty dollars but not more than two thousand five hundred dollars" Fourth degree felony *Id.* § 30-16-20 (Michie 1994)	30 months N.M. Stat. Ann. § 31-18-17(B) (Michie 2000) (amended 2001); *Stat v. Linam*, 600 P.2d 253, 255 (N.M. 1979)
New York	not more than 4 years N.Y. Penal Law § 70.00(2)(e) (McKinney 1998) "[t]he value of the property exceeds one thousand dollars" Id. § 155.30(1) (McKinney 1999), Grand larceny in the fourth degree Class E felony *Id.* § 155.30	3 to 4 years N.Y. Penal Law § 70.06(3)(e) (McKinney 1998)
North Carolina	1 year to 30 months N.C. Gen. Stat. §§ 15A-1340 17(c), (d); 14-72(a) (1999) "[l]arceny of goods of the value of more than $1,000" Class H felony *Id.* § 14-72(a)	not applicable N.C. Gen. Stat. § 14-7.1 (1999)

North Dakota	not more than 5 years N.D. Cent. Code § 12.1-32-01 (1997) "[t]he property . . . stolen exceeds five hundred dollars in value" Class C felony *Id.* § 12.1-23-05(2)(a)	not more than 10 years N.D. Cent. Code § 12.1-32-09(2)(c) (1997) (amended 2001)
Ohio	6 to 12 months Oh. Rev. Code Ann. § 2929.14(A)(5) (West 2001) "the value of the property . . stolen is five hundred dollars or more and is less than five thousand dollars" Fifth degree felony *Id.* § 2913.02(B)(2) (West Supp. 2001)	no general recidivist statute
Oklahoma	not more than 5 years Okla. Stat. Ann. tit.21, § 1705 (West Supp. 2002) "the property taken is of value exceeding Fifty Dollars" Grand larceny *Id.* tit. 21, § 1704 (West 1983) (amended 2001)	not less than 20 years Okla. Stat. Ann. tit. 21, § 51.1(B) (West Supp. 2000) (amended 2001)
Oregon	not more than 5 years Or. Rev. Stat. § 161.605 (2001) "[t]he total value of the property . . . is . . . $750 or more" First degree theft *Id.* § 164.055	no general recidivist statute
Pennsylvania	not more than 5 years 18 Pa. Cons. Stat. Ann. § 1104(3) (West 1998) "theft not [exceeding $2,000]" First degree misdemeanor *Id.* § 3903(B) (West Supp. 2002)	not applicable 42 Pa. Cons. Stat. Ann. § 9714(A)(1) (West 1998)

Rhode Island	not more than 10 years R.I. Gen Laws § 11-41-5(a) (2000) "the value of the property . . . exceeds five hundred dollars" *Ibid.*	not applicable R.I. Gen. Laws § 12-19-21(a) (2000)
South Carolina	not more than 5 years S.C. Code Ann. § 16-13-110(8)(2) (Supp. 2001) "the value of the shoplifted merchandise is more than one thousand dollars but less than five thousand dollars" Felony *Ibid.*	not applicable S.C. Code Ann. § 17-25-45(A),(B),(C)(1) & (2) (Supp. 2001)
South Dakota	not more than 10 years S.D. Codified Laws § 22-6-1(6) (Michie 1998) "[t]he value of the property stolen exceeds five hundred dollars" Grand theft Class 4 felony *Id.* § 22-30A-17(1)	up to life S.D. Codified Laws §§ 22-7-8 (Michie 2001)
Tennessee	2 to 4 years Tenn. Code Ann. §§ 40-35-105(b)(4), 40-35-112(a)(4) (1997) "the value of the property . . . obtained is one thousand dollars or more but less than ten thousand dollars" Class D felony *Id.* § 39-14-105(3)	4 to 8 years Tenn. Code Ann. §§ 40-35 106(a)(1), (c); 40-35-112(b)(4) (1997)

Texas	not more than 1 year Tex. Penal Code Ann. § 12.21(2) (Vernon 2002) "the value of the property stolen is $500 or more but less than $1,500" Class A misdemeanor *Id.* § 31.03(e)(3)	2 to 20 years Tex. Penal Code Ann. §§ 12.33(a), 12.35(c)(2)(A), 12.42(a)(3) (Vernon 2002)
Utah	not more than 5 years Utah Code Ann. § 76-3-203(3)(c) (1999) (amended 2000) "the value of the property . . . is or exceeds $1,000 but is less than $5,000" Third degree felony *Id.* § 76-6-412(b)(1) (1999)	not applicable Utah Code Ann. § 76-3-203.5 (Supp. 2001)
Vermont	not more than 10 years Vt. Stat. Ann. Tit. 13, § 2501 (1998) "the . . . property stolen exceeds $500.00 in value" Grand larceny *Ibid.*	up to life or not more than 10 years Vt. Stat. Ann. Tit. 13, § 11 (1998); *State v. Angelucci*, 405 A.2d 33, 42, 137 Vt. 272, 289-90 (1979)
Virginia	2 years, 1 month to 5 years, 3 months guideline range, Va. Code Ann. § 17.1-805 (Michie 2000) (level 51, Larceny) 1 to 20 years statutory range Va. Code Ann. § 18.2-95 (Michie Supp. 2001) "goods . . . of the value of $200 or more" Grand larceny *Ibid.*	not applicable Va. Code Ann. § 19.2-297.1 (Michie 2000)

Washington	1 year, 1 day to 14 months, not more than 5 years Wash. Rev. Code Ann. §§ 9A.90.021(1)(c); 9.94A.510(1) (West 2002) "[p]roperty . . . which exceeds two hundred and fifty dollars in value . . . but does not exceed one thousand five hundred dollars" Second degree theft Class C felony *Id.* § 9A.56.040(1)(a)	not applicable Wash. Rev. Code Ann. §§ 9.94A.030(28), (32)(a)(i), (ii); 9.94A570 (West 2001)
West Virginia	not more than 60 days W. Va. Code Ann. § 61-3A-3(a)(2) (Michie 2000) "the value of the merchandise exceeds five hundred dollars" Misdemeanor *Ibid.*	not applicable W. Va. Code Ann. § 61-11-18(a) (Michie 2000)
Wisconsin	not more than 5 years Wis. Stat. Ann § 939.50 (3)(e) (West Supp. 2001) "the value of the property exceeds $1,000 but not $2,500" Class E felony *Id.* § 943.20(3)(b) (West 1996)	not more than 11 years Wis. Stat. Ann. § 939.62 (1)(b), (2) (1996)
Wyoming	not more than 10 years Wyo. Stat. Ann. § 6-3-404(a)(i) (Michie 2001) "the value of the property is five hundred dollars or more" *Ibid.*	not applicable Wyo. Stat. Ann. § 6-10-201(a)(i) & (ii) (Michie 2001)

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 1 2002
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No. 01-6978

GARY A. EWING, Petitioner,

v.

STATE OF CALIFORNIA

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a sentence of life with the possibility of parole after twenty-five years for a felony recidivist convicted of grand theft amounts to "cruel and unusual punishment."

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In the Supreme Court of the United States

No. 01-6978

GARY A. EWING, Petitioner,

v.

STATE OF CALIFORNIA

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

In 1984, petitioner Gary Ewing was convicted of grand theft in Ohio. Later, between 1988 and 1993, petitioner suffered a series of criminal convictions in California for eight misdemeanors, including battery and unlawful possession of a firearm. These convictions resulted in several periods of incarceration in jail and terms of probation. J.A. 4-6, 13-14.

Next, in a prosecution arising from crimes committed on three separate dates in Long Beach in 1993, a jury convicted petitioner of three counts of first-degree residential burglary and one count of first-degree residential robbery. J.A. 6, 8-10; Clerk's Tr. 85. For sentence-enhancement purposes, see Cal. Penal Code § 12022(b), the jury found that petitioner personally had used a knife in committing one of the

burglaries and the robbery connected to it. See Clerk's Tr. 87. The court sentenced petitioner to state prison for a term of nine years, eight months. *Id.*

In 1994, the California Legislature, by votes of 29-7 in the Senate and 63-9 in the Assembly, enacted the "Three Strikes and You're Out" felony-recidivist sentencing law. Cal. Penal Code § 667(b)-(i). Later that year, California voters adopted, by 72-28 percent in a statewide initiative election, a virtually-identical version of the "Three Strikes" law. *Id.* § 1170.12. Under "Three Strikes," a repeat felony offender previously convicted of a "serious" or "violent" felony, as elsewhere defined in the Penal Code,[1/] receives a doubled prison sentence for any new felony conviction. *Id.* §§ 667(e)(1), 1170.12(c)(1). A repeat felon with two or more prior convictions for "serious" or "violent" felonies receives a prison sentence of at least twenty-five years to life for any new felony conviction. *Id.* §§ 667(e)(2), 1170.12(c)(2).

Petitioner was paroled from prison for the Long Beach crimes in June 1999. J.A. 6, 14. While still on parole ten months later, in April 2000, petitioner entered The Pro Shop at a golf course in El Segundo. After purchasing a bucket of golf balls, petitioner lingered inside the shop. Then he stole three golf clubs, with a total retail value of approximately $1,200, hiding them in the legs of his pants. Police officers in the parking lot outside the shop saw petitioner remove the

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[1/] "Violent" or "serious" felonies, as defined in the "Three Strikes" law by reference to partially overlapping sections 667.5 and 1192.7 of the California Penal Code, include crimes such as murder; attempted murder; voluntary manslaughter; mayhem; arson; first-degree burglary; robbery; grand theft involving a firearm; kidnapping; carjacking; rape; lewd or lascivious act on a child under the age of fourteen; continuous sexual abuse of a child; furnishing heroin, cocaine, or PCP to a minor; and any felony or attempt to commit a felony otherwise punishable by death or life imprisonment. The full text of current sections 667.5 and 1192.7 are set out in Appendix A to this brief.

clubs from his pants, and arrested him on the spot. Rep. Tr. 346-365, 382-389.

The state charged petitioner with one count of felony burglary and one count of felony grand theft of personal property worth in excess of $400. Clerk's Tr. 25-26; see Cal. Penal Code §§ 459-461, 484, 489. The prosecutor formally alleged, as required by the "Three Strikes" law, §§ 667(g), 1170.12(e), that petitioner had previously sustained the four prior "serious" or "violent" felony convictions for the 1993 burglaries and robbery in Long Beach. Clerk's Tr. 25-26. A jury acquitted petitioner on the new burglary count, but convicted him of grand theft. *Id.* at 80-81. In a bifurcated portion of the trial, the judge found that petitioner indeed had suffered the four prior felony convictions. *Id.* at 90; Rep. Tr. 1201-1209.

At the sentencing hearing, petitioner asked the judge to invoke a mechanism, provided by a state statute, to reduce the grand-theft conviction to that of a misdemeanor. J.A. 9; see Cal. Penal Code § 17(b). Reducing the conviction to a misdemeanor would have avoided "Three Strikes" sentencing, for the latter is triggered only by a new conviction for a felony. *Id.* §§ 667(d)(1), 1170.12(b)(1); see *People* v. *Superior Court (Alvarez)*, 14 Cal. 4th 968, 979, 60 Cal. Rptr. 2d 93, 928 P. 2d 1171 (1997). Petitioner also asked the judge to "strike," in the exercise of discretion also allowed under state law, some or all of the prior-conviction findings. J.A. 9; see Cal. Penal Code § 1385; *People* v. *Superior Court (Romero)*, 13 Cal. 4th 497, 529-532, 53 Cal. Rptr. 2d 789, 917 P. 2d 628 (1996); *People* v. *Garcia*, 20 Cal. 4th 490, 499-500, 85 Cal. Rptr. 2d 280, 976 P. 2d 831 (1999). Striking three of the four prior-conviction findings would have resulted only in a doubled prison sentence for the grand theft. Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1). Striking all of the prior-convictions findings would have allowed the judge

to impose an ordinary prison sentence of up to four years. *Id.* §§ 17, 18, 486-487, 667.5(b).

Before deciding on the sentence, the judge stated that she had read the file in petitioner's Long Beach case, and she discussed some of the underlying facts of that case—e.g., the nighttime nature of one of the burglaries while the victim was at home, petitioner's use of the knife,[2/] and the sequence of offenses on three separate days. J.A. 8, 9, 11, 13. The judge also took note of petitioner's entire felony and misdemeanor record and the timing of his latest offense while on parole from prison. *Id.* at 13-14. And, she heard defense counsel's arguments and a plea from petitioner himself. *Id.* at 9-13.

In the end, the judge determined that the grand theft should remain a felony and be punished accordingly, and that the prior-conviction findings should stand, leaving petitioner subject to "Three Strikes" sentencing. J.A. 13-15. As a

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[2/] Petitioner's brief asserts that he "did not use" a knife in the prior burglary-robbery. (Pet. Br. 6.) But, as noted above, there was a formal finding in that case that he had done so. See Clerk's Tr. 87. And the reporter's transcripts in petitioner's Long Beach preliminary hearing and trial, lodged with this Court by respondent in connection with this case, discloses that the victim in the burglary-robbery testified that petitioner had drawn a knife and threatened him. L.A. Superior Ct. Case NA018343-01, Rep. Tr. 113; see *id.* Clerk's Tr. 7-9, 18. The brief of amicus curiae Families Against Mandatory Minimums is also incorrect insofar as it indicates that petitioner's burglary became a robbery because he had used a knife. (FAMM Br. 8 at n. 4.) Petitioner committed burglary upon entering a residence with intent to steal; he committed robbery by stealing property by force or fear from the person of the victim. See Cal. Penal Code §§ 211, 459. Although petitioner is correct in saying that the court "stayed" his sentence on the robbery-related burglary under section 654 of the California Penal Code (Pet. Br. 6, n. 5), that does not mean he committed only one offense; section 654 sweeps more broadly than its literal language to prohibit multiple punishment for multiple crimes if committed during an indivisible transaction. See *Neal* v. *California*, 55 Cal. 2d 11, 18, 9 Cal. Rptr. 607, 357 P. 2d 839 (1960).

newly-convicted felon with two or more "serious" or "violent" felony convictions in his past, petitioner was sentenced to state prison for an indeterminate term of life with the possibility of parole after twenty-five years. *Id.* The judge dismissed a further sentence-enhancement finding, one based upon petitioner's service of a prior prison term, see Cal. Penal Code § 667.5(b), that otherwise would have added one more year to petitioner's minimum prison term. *Id.* at 14.

The California Court of Appeal, in an unpublished opinion, upheld the conviction and sentence against petitioner's claims that the court had abused its sentencing discretion and that the sentence amounted to unconstitutional "cruel and unusual punishment." App. to Pet. for Cert. 28-30. The California Supreme Court denied discretionary review. *Id.* at 33.

SUMMARY OF ARGUMENT

This Court's Eighth Amendment jurisprudence restricts the judiciary's power to override criminal sentences prescribed by the state legislatures. Courts generally must defer to legislative policy choices in the fixing of sentences in a federal system of fifty states because, first, the Constitution does not dictate adherence to any particular penological theory. Second, it is difficult for a court to identify objective reasons, as opposed to a judge's own subjective policy preferences, that convincingly may demonstrate that a sentence endorsed by the people's elected representatives is nevertheless extreme and grossly disproportionate to the evils it is designed to redress.

Deference to the legislature's sentencing policies should be at its zenith in this case for many reasons. Most important, this is a case of felony recidivism. It is problematic enough for courts to balance the seriousness of given offenses with the degree of punishment. But it is especially perilous for any

court to attempt to re-determine—in conflict with elected legislators—the weight to be ascribed to the problem of repeated commission of felonies by a class of offenders who, as experience has shown, are responsible for criminal activity greatly disproportionate to their numbers. A judge's proffered explanation for doing so runs a heightened risk of being, and being perceived as, little more than the substitution of his or her preferences for those of the people and their elected policymakers.

Given that deference, the basic features of California's "Three Strikes" law provide assurances that the sentences it mandates are not "extreme" and "grossly disproportionate" to crimes committed by recidivists. The California statute relies, fundamentally, on traditional classifications of certain crimes as felonies. Equally important, it further narrows the class of offenders subject to its operation to felony recidivists who already have committed multiple felonies of a heightened serious or violent nature. New felonies committed by such offenders pose a special threat to the community because those criminals have demonstrated both their willingness to commit serious or violent crimes and also their continuing incorrigibility. The people of a state, of course, charge their elected representatives with the responsibility of assessing the weight of this threat, in light of myriad local variables, and prescribing a sentencing scheme that properly accounts for public safety.

Moreover, because the "Three Strikes" sentence imposed in this case allows for the possibility of parole, there is all the more reason for courts to stay their hand and defer to the people and their legislators. As this Court has recognized in considering Eighth Amendment challenges to imprisonment for crimes, courts generally lack objective criteria for drawing constitutional lines between one term of years and another. It is not surprising, then, that this Court has never overturned a prison sentence, on account of its duration alone, if

imprisonment for the offense was permissible at all and the sentence allowed a possibility of parole.

Finally, although the life sentences prescribed by the "Three Strikes" law become mandatory when the defendant finally has been adjudged a felon with two prior serious or violent "strikes," California law preserves opportunities for the sentencing court, in making certain preliminary determinations based on guided discretion, to impose a lesser sentence instead. This opportunity for leniency provides a further guarantee against a "grossly disproportionate" sentence in violation of the Constitution.

In light of all these features, petitioner's "Three Strikes" sentence of life imprisonment, with eligibility for parole after twenty-five years, is proportionate to his felony grand-theft conviction as aggravated by his prior serious felony convictions for residential burglary and robbery. This Court has upheld similar life-with-parole punishment for recidivism involving only non-violent felonies; and it has upheld the harsher sentence of imprisonment for life, without possibility of parole, for a first-time offense of possessing cocaine. In light of these precedents, and given the deference courts should accord to the state legislatures in the fixing of prison sentences for felony recidivists, the Court should uphold petitioner's sentence in this case too.

ARGUMENT

A SENTENCE OF LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE, IMPOSED UPON A RECIDIVIST FOR A NEW FELONY CONVICTION, IS NOT "CRUEL AND UNUSUAL PUNISHMENT"

In cases culminating in *Harmelin* v. *Michigan*, 501 U.S. 956 (1991), this Court has considered many challenges to the lengths of prison sentences under the Cruel and Unusual

Punishments Clause of the Eighth Amendment. E.g., *Solem* v. *Helm*, 463 U.S. 277 (1983); *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam); *Rummel* v. *Estelle*, 445 U.S. 263 (1980); *Badders* v. *United States*, 240 U.S. 361 (1916); *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); see also *Weems* v. *United States*, 217 U.S. 349 (1910); *Robinson* v. *California*, 370 U.S. 660 (1962). The Court has never condemned as "cruel and unusual" any prison sentence offering at least a possibility of release on parole to a recidivist felony offender. Indeed, this Court has repeatedly recognized the logical and constitutional validity of dramatically enhanced sentences for felony recidivists. E.g., *Parke* v. *Raley*, 506 U.S. 20, 26-28 (1993); *Rummel*; *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967); *Gryger* v. *Burke*, 334 U.S. 728 (1948); *Graham*, 224 U.S. at 631; *Moore* v. *Missouri*, 159 U.S. 673, 676-678 (1895).

Petitioner's sentence of twenty-five years to life is undoubtedly a long one. But it reflects a rational, graduated, and penologically-sound legislative response to the enhanced blameworthiness and substantial threat to public safety posed by serious or violent offenders who continue to commit felonies. Because petitioner has a record of prior serious or violent felonies and now has committed yet another felony—and also because he is promised a possibility of parole—petitioner's "Three Strikes" sentence is proportionate to his offense. And, certainly, his punishment is not so "grossly disproportionate" as to violate the Cruel and Unusual Punishments Clause.

A. A punishment of imprisonment can violate the Eighth Amendment only if it is an "extreme sentence" that is "grossly disproportionate" to criminal conduct.

1. In *Harmelin* v. *Michigan*, this Court's most recent consideration of the question of whether a prison sentence

might violate the Eighth Amendment because of its duration, the majority upheld a mandatory life-without-parole sentence for the crime of possessing 672 grams of cocaine. Justice Scalia's lead opinion, joined by the Chief Justice, broadly rejected the notion that the Eighth Amendment empowers courts to assess the "proportionality" of felony prison sentences. 501 U.S. at 994. As explained by Justice Scalia, neither the history nor the text of the Cruel and Unusual Punishments Clause provides a sufficient basis for permitting appellate review of the "proportionality" of felony criminal punishment outside the unique context of the death penalty. *Id.* at 966-985. Justice Scalia's opinion also concluded that, in any event, courts lack objective guidelines by which to second-guess legislative judgments about the appropriate length of sentences of imprisonment. *Id.* at 985-990.

A concurring opinion authored by Justice Kennedy, and joined by Justice O'Connor and Justice Souter, discerned from the Court's precedents a set of principles dictating tight restrictions on the scope of any judicial review of the "proportionality" of prison sentences. First, prison terms reflect substantive penological judgments generally within the province of legislatures rather than courts. 501 U.S. at 998. Second, the Constitution does not mandate adherence to any one penological theory. *Id.* at 999. Third, marked divergences in sentencing theories and in sentence lengths are inevitable, and often beneficial, in our federal system. *Id.* at 999. Fourth, proportionality review should be informed by "objective factors to the maximum possible extent," *id.* at 1000-1001; the "Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices," *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981); *Davis*, 454 U.S. at 370. Those principles inform a final one: that the Constitution does not require "strict proportionality between crime and sentence," but instead forbids only "extreme" sentences that are "grossly

disproportionate" to the crime. *Harmelin*, 501 U.S. at 1001. Given these principles, the *Harmelin* concurrence re-affirmed what earlier opinions of this Court also had recognized: "Outside the context of capital punishment successful challenges to the proportionality of particular sentences are exceedingly rare." *Id.*; *Helm*, 463 U.S. at 291; *Rummel*, 445 U.S. at 272. Applying the Eighth Amendment's "narrow proportionality principle" in *Harmelin*, 501 U.S. at 997, the concurring opinion approved the mandatory life-without-parole sentence for the cocaine-possession offense on grounds that the sentence did not raise an initial inference of "gross disproportionality." Because the sentence raised no such inference, there was no justification for inquiring further into "intrajurisdictional" or "interjurisdictional" sentence comparisons. *Id.* at 1005; cf. *Solem* v. *Helm*, 463 U.S. at 290-293.

The dissenting opinion in *Harmelin* authored by Justice White concluded that the defendant's offense of simple possession of cocaine was not so dangerous as described in the concurring opinion. Comparing the sentence with others meted out in Michigan for different crimes, and with others prescribed in other states for the same crime, Justice White's dissent concluded that the severity of a life-without-parole sentence for possession of cocaine rendered it unconstitutionally cruel and unusual. 501 U.S. at 1018-1027. A dissent by Justice Stevens emphasized the death-penalty-like irrevocable nature of imprisonment for life without the possibility of parole. 501 U.S. at 1028-1029.

2. This Court has followed a general rule for such fragmented decisions, treating the concurring opinion supporting the judgment on the narrowest ground as representing the holding of the case. See *United States* v. *Marks*, 430 U.S. 188, 193 (1977). Under that test, the

principles set forth in Justice Kennedy's concurring opinion would constitute the true "rule" of *Harmelin*.[3/]

3. In the event, petitioner's sentence would remain constitutional under any of the *Harmelin* opinions. Under the analysis in Justice Scalia's opinion, petitioner's sentence in this case is clearly constitutional: Petitioner stands convicted of a crime properly classified and classifiable as a felony, and his punishment of imprisonment is non-capital in nature. No further inquiry, under Justice Scalia's and the Chief Justice's *Harmelin* view, is required.

As respondent will demonstrate in Section B, *post*, petitioner's sentence is neither "extreme" nor "grossly disproportionate" to his crime. Therefore, it is constitutional under Justice Kennedy's *Harmelin* test too.

Finally, as will be shown in Section C, *post*, intrajurisdictional and interjurisdictional comparisons would in fact only confirm the validity of petitioner's punishment.

[3/] Some Courts of Appeals have drawn that conclusion. E.g., *United States* v. *Hill*, 30 F.3d 48, 50 (6th Cir. 1994); *Henderson* v. *Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *Andrade* v. *Attorney General of the State of California*, 270 F.3d 743, 754 (9th Cir. 2001), cert. granted sub nom. *Lockyer* v. *Andrade* (No. 01-1127); *United States* v. *Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); but see *Henry* v. *Page*, 223 F.3d 477, 482 (7th Cir. 2000) (concluding that *Solem* v. *Helm* remains the rule, but that "in non-capital felony convictions, a particular offense that falls within legislatively prescribed limits will not be considered disproportionate unless the sentencing judge has abused his discretion"); *United States* v. *Krastas*, 45 F.3d 63, 67 (4th Cir. 1995). To say that Justice Kennedy's opinion reflects the true *Harmelin* rule, however, is not to say that *Harmelin*, a non-recidivist case involving a life-without-parole sentence, "clearly established" or "dictated," in the special sense of those terms in habeas corpus cases, a rule of law for a recidivist, life-with-parole case. See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000); *Butler* v. *McKellar*, 494 U.S. 407, 414-415 (1990) (rule of "controlling" case is not necessarily "dictated" by precedent for purposes of habeas corpus relief). Whether it did is an issue in *Lockyer* v. *Andrade* (No. 01-1127).

So, his sentence would survive scrutiny even under the comparative analyses endorsed by the *Harmelin* dissent.

B. Petitioner's sentence is not "grossly disproportionate," and therefore comports with the Eighth Amendment.

The Eighth Amendment is satisfied in this case because there is no sufficient basis for drawing even an initial inference that the severity of petitioner's sentence is "extreme" and "grossly disproportionate" to the seriousness of his crime as a repeat felon. See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). This may be seen in two distinct ways. First, the severity of petitioner's sentence, in light of his criminal record, is comparable to other sentences this Court has upheld in similar cases. Second, the basic characteristics of the California "Three Strikes" law—particularly its requirement of a new felony conviction by an offender with a history of prior serious felony convictions—cabins its application so that judicial deference to sentences imposed under the statute is warranted.

1. This Court previously has upheld comparable punishments for crimes that were not more serious than petitioner's.

a. Since 1980, this Court three times has upheld long prison sentences against Eighth Amendment challenges. In *Rummel* v. *Estelle*, the Court upheld a life-with-possibility-of-parole sentence for a repeat felony offender who had committed, in sequence, an $80 credit-card fraud, a $29 check forgery, and a $120 theft by false pretenses. 445 U.S. at 268-285. In *Hutto* v. *Davis*, the Court upheld a forty-year prison sentence—not even based upon recidivism—for possession and transfer of nine ounces of marijuana. 454 U.S.

at 370-374. Most recently, in *Harmelin* v. *Michigan*, the Court upheld a life-without-parole prison sentence for a first-time offense of possessing cocaine. 501 U.S. at 961, 996, 1009.

The Court did the same in two earlier cases. In *Graham* v. *West Virginia*, the Court upheld a recidivism-based life sentence for a defendant convicted, over time, for stealing a $50 horse, for entering a stable with intent to steal a horse, and for stealing another horse and accessories valued at $160. 224 U.S. at 620-621, 631. And, in *McDonald* v. *Massachusetts*, the Court upheld a twenty-five-year sentence for a recidivist convicted earlier of perjury and obtaining property by false pretenses, and then of forging and uttering a money order. 180 U.S. at 311-313.

b. Petitioner's "Three Strikes" felony record of recidivism—comprising prior convictions for burglaries and robbery and a new conviction for grand theft—is not demonstrably less serious than the array of crimes in either the modern case of *Rummel* or the older cases of *Graham* and *McDonald*. Nor is petitioner's record of such repeated felony convictions obviously less serious than the marijuana offenses in *Davis* or the cocaine-possession offense in *Harmelin*. Petitioner personally has demonstrated a propensity to commit burglary and robbery; and, despite prior convictions for those serious and violence-related offenses, he has now signaled his continuing incorrigibility by committing yet another felony. The threat to society posed by the conduct of a repeat offender like petitioner is at least similar in gravity to the unrealized threat posed by the cocaine-possessing defendant, with no prior convictions, who received a harsher sentence for the single offense in *Harmelin*.

Moreover, petitioner's sentence of an indeterminate life term with the possibility of parole after twenty-five years is reasonably comparable to the indeterminate life terms in *Rummel* and *Graham*, the forty-year term in *Davis*, and the

twenty-five-year term in *McDonald*. And it is categorically less severe than the life-without-parole sentence in *Harmelin*. Given *Rummel* especially, the constitutional validity of petitioner's sentence follows a fortiori. See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (Eighth Amendment review should take "full account" of *Rummel* and *Davis*). Certainly, *Rummel*, *Davis*, *Harmelin*, *Graham*, and *McDonald* do not support an affirmative inference of "gross disproportionality" in petitioner's sentence.

c. Petitioner relies heavily upon *Solem* v. *Helm*, *supra*, for that purpose, but the reliance is misplaced. In *Helm*, the defendant had passed a bad check for $100 and previously had been convicted of "six non-violent felonies": three third-degree burglaries that, it appears, did not involve entry into homes; obtaining money by false pretenses; grand larceny by fraud; and driving while drunk. 463 U.S. at 279-281. The judge exercised his discretion to sentence Helm to prison for life without the possibility of parole. *Id.* at 279-281. This Court found the sentence to be cruel and unusual. *Id.* at 303.

The Court took care, however, to distinguish Helm's case from *Rummel* on its facts. 463 U.S. at 288 n.13, 301-302, 303 n. 32. The Court emphasized that Helm's new bad-check offense was "one of the most passive a person could commit," involving an amount that would not even have supported a felony offense under state law if he had stolen the money directly. In addition, the Court made the judgment that, with respect to the prior offenses, "all were nonviolent and none was a crime against a person." *Id.* at 296-297. The Court also distinguished Helm's punishment from Rummel's, concluding that Helm's life sentence was "far more severe" because it contained no possibility of parole. *Id.* at 297, 300-303.

Helm's ways of distinguishing *Rummel*, however, generally do not apply either to petitioner's offenses, old or new, or to his sentence in this case. Petitioner indeed stole goods, from the presence of the storekeeper, the value of which was three times higher than the amount required to classify the theft as a felony. In addition, petitioner's prior "strikes" were for felonies that, even considered in the abstract, necessarily presented a palpable threat of violence and/or were aimed at the person. In the actual event, of course; petitioner committed night-time residential burglaries with victims present and at risk, and he robbed one victim with a knife.

A further, critical distinction between petitioner's case and *Helm* lies in the fact that, once his felony conviction and the "strikes" findings were sustained by the court's discretionary rulings, petitioner's life-with-parole sentence became a mandatory one, fixed by the Legislature itself and confirmed by a popular vote of the people. By contrast, not only did the judge in *Helm* exercise his discretion in choosing the length of Helm's sentence, he did so in an extraordinary way. The *Helm* Court observed that there was no indication "that any habitual offender other than Helm ha[d] ever been given the maximum sentence on the basis of comparable crimes." 463 U.S. at 299. This Court has recognized that more deference is due in the review of sentences that have been mandated by the state legislature. See *Harmelin*, 501 U.S. at 1006-1007 (Kennedy, J., concurring) ("To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Helm*, but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry."); *Helm*, 463 U.S. at 299 n.26.

This Court's own prior applications of the Cruel and Unusual Punishments Clause, then, provide no basis for an affirmative inference of "gross disproportionality" in this

case. They serve, instead, as the basis for the opposite conclusion—that petitioner's sentence in this case is constitutional.[4/]

2. The essential components of California's "Three Strikes" law ensure the proportionality of sentences imposed under it.

Basic, objective characteristics of a California "Three Strikes" sentence also support the conclusion that the sentence in this case does not give rise to an inference of "gross disproportionality." Most important, petitioner was sentenced as a felony recidivist with a record of crimes that not only are traditionally "classified and classifiable" as

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[4/] As noted in Judge Sneed's dissenting opinion in *Andrade* v. *Attorney General of the State of California*, 270 F.3d at 770 n. 1, no other federal court of appeals after *Harmelin* has rejected a felony-recidivist prison sentence as cruel and unusual. And, notwithstanding the recent and unjustified forays by the Ninth Circuit in *Andrade* and in *Brown* v. *Mayle*, 283 F.3d 1019 (9th Cir. 2002), other federal courts of appeals before and after *Harmelin* have upheld comparable lengthy sentences in circumstances similar to those in this case. See *Hutto* v. *Weber*, 275 F.3d 682 (8th Cir. 2001) (eighty-five-year recidivist sentence for burglary and aiding escape); *Smallwood* v. *Johnson*, 73 F.3d 1343, 1345 (5th Cir. 1996) (fifty-year recidivist sentence for shoplifting with prior burglary and drug-possession); *Bocian* v. *Godinez*, 101 F.3d 465, 472 (7th Cir. 1996) (fifty-five year prison term for two counts of residential burglary and related offenses); *McGruder* v. *Puckett*, 954 F.2d 313 (5th Cir. 1992) (life-without-parole sentence for automobile burglary conviction following convictions for armed robbery, burglary, escape, and robbery); *Alford* v. *Rolfs*, 867 F.2d 1216 (9th Cir. 1989) (life sentence for possession of stolen property with priors for possessing drugs, selling heroin, and forgery); *Chandler* v. *Jones*, 813 F.2d 773 (6th Cir. 1987) (life with parole sentence for third non-violent felony of commercial burglary); *Griffin* v. *Warden*, 517 F.2d 756 (4th Cir. 1975) (life imprisonment for grand larceny following breaking-and-entering and residential burglary convictions).

felonies, see *Rummel*, 445 U.S. at 274, but that include felonies falling within a narrowed subclass of crimes of increased seriousness—here, burglary and robbery offenses inherently posing a threat of violence. These objective factors help establish the "seriousness" of petitioner's criminal conduct. Further, the prison sentences required by the "Three Strikes" law, although long, do not irrevocably deprive felony recidivists of their liberty. Here, petitioner received a non-capital sentence holding out a possibility of release, in this case by the eventual opportunity for parole. See *Harmelim*, 501 U.S. at 1000 (Kennedy, J., concurring) ("[t]he most prominent objective factor is the type of punishment imposed"). Finally, the "Three Strikes" scheme allows the sentencing judge to exercise discretion so as to avoid a life sentence in appropriate cases.

Judicial deference to the legislative sentence choices embodied in the California scheme strikes a proper balance between the legislature's historically broad policymaking authority and the judiciary's essential but limited authority to intervene in the "exceedingly rare" case. See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). Such deference in a case like this is underwritten by assurances, provided by objective historical and empirical factors, that even very lengthy prison sentences represent a rational penological choice for felony recidivists with records of serious or violent felonies. See *id.* at 1003, 1004. Deference premised upon a state's adoption of sentences that work within the objective boundaries set out by the "Three Strikes" law also minimizes the acknowledged risk of mere judicial second-guessing of the legislative line-drawing involved in what is in essence a question of degree. See *Harmelin*, at 1000. Given the objective features of the "Three Strikes" law, the field will have been sufficiently circumscribed so that no punishments within its boundaries should be condemned by a court as "grossly disproportionate" and unconstitutional.

a. Enhancement of sentences for recidivism is a longstanding and empirically-justified practice that warrants heightened judicial deference.

This is, primarily, a case about felony recidivism. And the recidivist sentencing scheme employed here is supported by history, common sense, and—as in *Harmelin*—empirical experience as well. 501 U.S. at 1002-1003 (Kennedy, J., concurring).

i. As noted earlier, this Court has repeatedly recognized the validity of greatly enhanced sentences for repeat violations of the law. *Parke* v. *Raley*, 506 U.S. at 26-28; *Rummel*, 445 U.S. at 275, 284; *Spencer* v. *Texas*, 385 U.S. at 560; *Gryger* v. *Burke*, 334 U.S. at 732; *Graham*, 224 U.S. at 630-631; *Moore* v. *Missouri*, 159 U.S. at 676-678. The state's interest in deterring and incapacitating such repeat felony offenders is "valid" and perhaps even "overwhelming." See *Helm*, at 297; *Davis*, 454 U.S. at 383 (Brennan, J., dissenting); *Rummel*, 445 U.S. at 276, 278, 284-285; cf. *Atkins* v. *Virginia*, 122 S. Ct. 2242, 2243 (2002) (death penalty for mentally retarded not justified by retribution or deterrence rationales).

A state legislature may conclude that convicted felons with a track record of prior serious or violent felonies are not only more blameworthy than those who have committed just one crime but also pose a special continuing threat to society requiring a tougher policy of incapacitation and deterrence. See *Rummel*, 445 U.S. at 285; see also *Schall* v. *Martin*, 467 U.S. 253, 278 & n. 30 (1984). Such a view is more than natural intuition and common sense. For example, a classic longitudinal study of males showed that chronic offenders comprising six percent of the study group committed more than three-fifths of the group's homicides and aggravated assaults, and approximately three quarters of its robberies and

rapes. M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (Chicago, 1972).

Further empirical experience in California supports the view that, as in this case, the "Three Strikes" law's range of punishment of repeat felony offenses is a rational response to the continued recidivism of a criminal who already had committed other serious or violent felonies. The United States Department of Justice reported, on the basis of a survey of 108,580 prisoners released from prison in eleven states in 1983, that 22.7 percent were re-arrested for a violent offense within three years; that nearly one-fifth of released property or public-order offenders were re-arrested in that time period for violent crimes; and that "[t]he more extensive a prisoner's prior arrest record, the higher the rate of r[illegible]ivism." U.S. DEPT. OF JUSTICE, BUREAU OF JUST[illegible] STATISTICS, "RECIDIVISM OF PRISONERS RELEASED IN 1983," 1-2, 6 (April 1989); see H. R. REP. No. 98-1073, at 1, 3 (1984); S. REP. No. 98-190, at 5 (1983); B. Janiskee & E. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. Rev. 43, 51 & n. 43 (2000); J. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 7-9 (2000).

A Rand study, prepared for the National Institute of Justice and based upon a survey of 2,190 prison and jail inmates in California, Michigan, and Texas, showed that California inmates had self-reported offense rates much higher than levels, ranging as high as an average of twenty crimes per year, reflected in previous studies. For example, a majority of California inmates convicted of robbery reported committing an average of fifty-three robberies and ninety burglaries per year; and almost four out of ten convicted of theft reported committing forty-one burglaries and three robberies per year. RAND CORP., SELECTIVE INCAPACITATION 43-47 (1982). The highest-rate offenders

accounted for a greatly disproportionate number of the reported crimes, but even the typical inmate—the "median"—reported committing fifteen crimes per year. See RAND CORP., VARIETIES OF CRIMINAL BEHAVIOR: SUMMARY AND POLICY IMPLICATIONS, Table A-15 (1982).

In addition, a 1994 Rand Corporation study estimated that, in terms of FBI Index categories, "the typical high rate offender commits seven serious crimes per year, including two violent ones," and "the typical low rate offender commits one serious crime every two-and-a-half years." RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW, 18 (1994). In light of those data, the study concluded that "over the next 25 years, the . . . three-strikes law will reduce the annual number of serious crimes in California 28 per cent on average below the number that would have been committed under the previous law." *Id.*

There is, therefore, a rational empirical basis for discerning a connection between renewed recidivism in felons who in the past had committed serious or violent crimes and the threat that they will commit many additional serious offenses in the future. This basis is analogous to the one upon which Justice Kennedy relied in *Harmelin* as a reason to validate the harsher life-without-parole sentence meted out to a defendant guilty of one-time possession of one-and-one-half pounds of cocaine. 501 U.S. at 1002-1003. In that Michigan case, Justice Kennedy's opinion cited studies indicating that high percentages of those arrested for homicides, assaults, robberies, and weapons-offenses had at least "*tested positive* for illegal drugs" and that, in the previous year, "60 percent of the homicides in Detroit were drug related, primarily *cocaine related*." *Id.* at 1003 (emphasis added).

It might be true that not every serious or violent felon who re-offends has committed or will commit many other serious crimes, just as it is true that "testing positive" for cocaine

upon arrest for a violent crime does not prove that cocaine actually played any role in the arrest offense. Indeed, the dissenting Justices in *Harmelin* argued that the defendant had been convicted only of simple possession of the cocaine, without formal proof of any intent to distribute it to others, and that the "ripple effect" of societal consequences from drugs is often not the direct result of "possession" but of "addiction" instead. 501 U.S. at 1022-1023 (White, J., dissenting). Nevertheless, Justices Kennedy, O'Connor, and Souter correctly concluded that the studies had "demonstrated a direct nexus between illegal drugs and crimes of violence." 501 U.S. at 1003.

ii. When a sentence is based upon felony recidivism connected to serious or violent crimes, the force of the principles that generally dictate judicial deference to legislative sentencing policies is at its apex. The new crime is aggravated by the defendant's moral culpability, resistance to rehabilitation, and risk to the community. Judicial review of the legislature's judgment on these matters is more complicated and more problematic than even the unadorned task of re-evaluating the bare "proportionality" of the sentence for one individual crime in isolation. Deepening the level of judicial review by an order of magnitude—to re-calibrate not just the weight of one crime but the weight of the recidivism dynamic—would force courts to make decisions practically indistinguishable from the policymaking of legislators. See *Rummel*, 445 U.S. at 285 ("the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.").

In *Solem* v. *Helm*, this Court analogized the judiciary's experiences with line-drawing in speedy-trial cases to the legislature's expertise in line-drawing in sentencing. 463 U.S. at 294-295. But the analogy is not a close one; and,

especially in the context of weighing recidivism, it highlights the dissimilarity, rather than any similarity, between the two endeavors. Judicial determinations of speedy-trial claims involve, in essence, retrospective and "functional" inquiries into the length, the reasons, and the results of delay. See *id.* Legislative line-drawing in the fixing of recidivist sentences involves, in contrast, policy determinations about the effects of incarceration on future crime rates and policy choices that properly may emphasize deterrence and incapacitation over rehabilitation. See *Harmelin*, 501 U.S. at 988-989 (op. of Scalia, J.), 999 (Kennedy, J., concurring). It also depends upon day-to-day familiarity with the rate and the effect of certain crimes on the locality and a practical sense of the level of leniency customarily extended by local officials like judges and prosecutors to offenders in the early stages of their offense history. And, not insignificantly, it expresses moral condemnation of the recidivist through the elected representative of the people. A judge or any other thoughtful citizen well might be capable of fixing, in the first instance, a rational prison sentence. But that fact does not suggest that anything would be gained and nothing would be lost, in terms of either legitimacy or expertise, if the court or the individual citizen were to supplant the legislature's view of the matter with their own.

iii. Petitioner's brief provides scant reason to overrule the California Legislature's evaluation—in terms of deterrence of crime, rehabilitation, incapacitation, and condemnation—of the harm caused and threatened by "Three Strikes" recidivists. Petitioner merely assumes, as an initial matter, that a threshold inference of "gross disproportionality" may arise from a comparison between his sentence and the crime of grand theft, without any consideration of the role of felony recidivism. (Pet. Br. 29.) He then asks the loaded question of whether the state's interest in deterring recidivism suffices to "rebut the inference of gross disproportionality" in his case.

(*Id.*) But, if the inference truly is a function of the seriousness of the offense and the severity of the sentence, recidivism logically factors into the determination of the seriousness of the crime in the first place. Given the state's valid interest in deterring recidivism, no inference of disproportionality arises in this case at all.

A similar error in approach exacerbates petitioner's second-guessing of the State Legislature on the issues of the seriousness of his three-strikes recidivist offense and the severity of his sentence. His arguments on these points consist largely of "comparative analyses" of other California statutes and the statutes of other states. Thus, in making an initial evaluation of the severity of his sentence, petitioner undertakes a kind of "interjurisdictional" comparison. He compares the degree by which his sentence exceeded a non-recidivist sentence for grand theft in California with the degree the defendant's sentence in *Rummell* v. *Estelle* exceeded a non-recidivist sentence in Texas. (Pet. Br. 28-29.) Also, in purporting to come to grips with the impact of recidivism in his threshold inquiry into the seriousness of his offenses, petitioner's brief engages in an "intrajurisdictional" analysis emphasizing how his sentence compares with other recidivism-based sentences in California. (Pet. Br. 32-37.)

The most obvious criticism of petitioner's arguments in those respects is that they do not respond to the opinions constituting the majority in *Harmelin*. In particular, Justice Kennedy's concurring opinion made it clear that intra- and interjurisdictional comparisons were appropriate "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." 501 U.S. at 1005. At that point, such comparisons would become relevant, if at all, only to "validate" a threshold inference anchored in other kinds of "objective evidence." See *id.* at 1000-1001, 1005.

Petitioner's circular reliance upon such comparisons, to both raise the "threshold" inference in the first place and then to corroborate it, therefore begs the question. Worse, an un-anchored, pure-comparison approach like petitioner's would lead inexorably to the conclusion, apparently rejected by a majority of this Court in *Harmelin*, 501 U.S. at 989-990 (Scalia op.), 1000 (Kennedy op.), and in *Davis*, 454 U.S. at 373 at n. 2, and in *Rummel*, 445 U.S. at 281-282, that any state prescribing what is comparatively the most severe punishment for a crime necessarily must be acting unconstitutionally. More telling, petitioner's immediate resort to artificial comparative analyses as a response to the state's asserted interest in deterring and incapacitating repeat offenders betrays the hollow center of his argument—the absence of any persuasive and objective reasons to overrule the penological judgment of the California Legislature. In the absence of such reasons, deference to the legislature must be the rule.

b. Other essential facets of California's recidivist scheme provide guarantees of proportionality.

Several other features of California's scheme make it especially appropriate for the courts to defer to the legislature in reviewing a "Three Strikes" law sentence. The scheme relies upon the traditional classification of certain crimes as felonies; it counts as "strikes" only prior convictions for felonies deemed "serious" or "violent"; it provides for the possibility of parole; and it gives judges discretion to dismiss "strikes" in the interest of justice.

The scheme relies upon traditional felony classifications.

i. The "Three Strikes" law's reliance upon a basic traditional criterion—the distinction between felonies and lesser classes of offenses—helps assure rationality and proportion in a recidivist sentencing scheme because that distinction rests on an independent basis in historical practice and has stood the test of time. In the area of defining crimes, of course, the states enjoy "wide latitude." *Montana* v. *Egelhoff*, 518 U.S. 37, 58 (1996). So it is not surprising that petitioner does not challenge California's power to outlaw and punish his "Three Strikes" crimes of burglary, robbery, and grand theft. Cf. *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (unconstitutional to punish by imprisonment "status" offense of drug addiction). Nor is it surprising that petitioner has never argued that the Constitution somehow prevented the legislature from classifying those offenses as felonies rather than misdemeanors. See *Jones* v. *Helms*, 452 U.S. 412, 422 (1981). In limiting its reach to felonies, California has relied upon a pre-existing classification of certain offenses as felonies that developed slowly and thoughtfully from enactment of the Penal Code in 1872 to modern times—for policy reasons independent of fixing "Three Strikes" recidivist sentences. Cf. *Pennsylvania* v. *McMillan*, 477 U.S. 79, 89 (1986).

ii. Petitioner suggests that any reliance in this case upon the classification of grand theft as a felony is undermined by the fact that grand theft in California—as with many other offenses—sometimes might ultimately be deemed a misdemeanor in an individual case. Such an argument, however, is a non sequitur. Grand theft is ordinarily and presumptively a felony: it is punishable by imprisonment in the state prison and thus meets California's statutory definition of a felony. Cal. Penal Code § 17(a); see §§ 484, 486, 488, 490. It is true that a grand theft of property valued

in excess of $400 might become a misdemeanor subsequent to certain specified circumstances occurring later in court—e.g., if the prosecutor charges the offense as a misdemeanor or the court punishes it as one. *Id.* § 17(b). But, for valid reasons, see p. 35, *post*, nothing like that occurred in petitioner's case. Petitioner's grand theft was charged as a felony, and the trial court denied petitioner's motion to punish it as a misdemeanor. So petitioner's offense at all times retained its status as a felony. *In re Anderson*, 69 Cal. 2d 613, 664 & n. 16, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968); *Doble* v. *Superior Court*, 197 Cal. 556, 576-577, 241 P. 852 (1925); *People* v. *Stanfil*, 76 Cal. App. 4th 1137, 1144-1145, 90 Cal. Rptr. 2d 885 (1999); see Cal. Penal Code § 667(d)(1) (referring to sentencing that "automatically *converts* the felony into a misdemeanor") (emphasis added); see also *People* v. *Statum*, __ Cal. 4th __, 2002 WL 167752 (July 25, 2002).

Nor does the mere fact that many California felonies can be reduced to misdemeanors suggest that the Legislature deems such offenses to be minor or trivial (Pet. Br. 25), or that it feels "ambivalent" about them (FAMM Br. 10). The state's purpose in providing a mechanism for converting some felonies to misdemeanors is, instead, to encourage rehabilitation and to allow for some leniency based upon individual circumstances. *In re Anderson*, 69 Cal. 2d at 664 & n. 16; *Necochea* v. *Superior Court*, 23 Cal. App. 3d 1012, 1016, 100 Cal. Rptr. 693 (1972). There is nothing "ambivalent" about the Legislature's view of such offenses: it has not retreated from its determination that grand theft—or any other current felony that might be converted into a misdemeanor—always may be punished as a felony by imprisonment in the state prison. Indeed, a felony later reducible to a misdemeanor might carry a state-prison term exceeding that prescribed for a non-reducible "straight"

felony.[5/] Among such felonies that might later become misdemeanors are many that no reasonable person could deem minor or trivial—for example, possession of deadly weapon with intent to use it to intimidate a trial witness, Cal. Penal Code § 136.5; vehicular manslaughter, § 193(c)(1); drunk-driving manslaughter, § 193(c)(3); shooting a missile at a passenger train or vessel, § 219.2; assault with a deadly weapon, firearm, or by means of force likely to produce great bodily injury, § 245(a)(1)-(2); shooting at a dwelling or occupied building, § 246; and child abuse likely to produce great bodily harm or death, § 273a.

iii. The mechanism for converting felonies into misdemeanors is indeed significant under the Eighth Amendment, but not in the way petitioner suggests. Instead, it helps assure proportionality because it provides an opportunity to ameliorate or avoid "Three Strikes" punishment in an individual case warranting it. See pp. 33-34, *post*. It could hardly exacerbate a risk of constitutional violation. Nor would it make sense, in service of the Cruel and Unusual Punishments Clause, to discourage lenity either by ignoring or denigrating a state's decision to place an offense presumptively within the class of felonies—or by seizing upon the flexibility a state has accorded its judges for the defendant's benefit as a reason to open its sentencing

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[5/] *Compare* Cal. Penal Code § 193(c)(1) (vehicular manslaughter), § 193(c)(3) (drunk-driving manslaughter), § 245(a)(1)-(3) (assault with firearm or force likely to produce great bodily injury), § 246 (shooting at inhabited house), § 273a (child abuse likely to produce great bodily harm or death), § 273d (wilful infliction of injury causing traumatic condition in a child), § 452 (starting forest fire causing bodily injury) *with* § 18 (default felony-sentence range), § 38 (misprision of treason), § 110 (facilitating prison escape), § 151 (successfully advocating death of peace officer with intent to kill), § 213(b) (attempted robbery), § 266f (selling person for immoral purposes), § 451 (arson of property).

scheme to an Eighth Amendment attack as to which it otherwise would have been immune.

iv. Petitioner strenuously asserts that his newest felony was not violent or inherently dangerous. (Pet. Br. 9, 24-27.) But the state's interest in dealing with repeat felons is not necessarily limited to violence or threats to safety. See *Rummel*, 445 U.S. at 275, 284-285. Besides, larceny traditionally has been deemed an offense regarding breach of the peace rather than the protection of property. "The unauthorized taking of property, even by stealth, from the owner's possession is apt to produce an altercation if the owner discovers the property moving out of his possession into the hands of the thief." W. LAFAVE & A. SCOTT, 2 SUBSTANTIVE CRIMINAL LAW § 8.1 (1986). Grand theft thus is not "one of the most passive" kinds of crime. Cf. *Helm*, 463 U.S. at 296. Nor is it a victimless or strict-liability crime. Cf. *Weems* v. *United States*, 217 U.S. at 363. It is not a crime one commits accidently by negligence or recklessness, but instead is one requiring specific intent to steal. See *Helm*, at 293. Of further significance, grand theft is not a "trivial offense," or a *malum prohibidum* offense, like overtime parking. Cf. *Harmelin*, 501 U.S. at 963 (op. of Scalia, J.). "Grand theft" of personal property in excess of $400 has been deemed a felony in California, under general penal laws devised independent of special recidivist provisions, since 1982.[6/]

[6/] Perhaps tacitly acknowledging that the inference is too weak, petitioner relegates to a footnote his feint at portraying his "Three Strikes" sentence as the impermissible result of "double counting" his prior felonies both to elevate his $1,200 theft from a misdemeanor and then to impose enhanced felony-triggered recidivist punishment. (Pet. Br. 25-26 at n. 13.) As explained in the text above, however, petitioner's grand theft was a felony ab initio on account of the value of the goods stolen, irrespective of his prior convictions. Petitioner's criminal record, in any event, extended well beyond the current felony and the two prior felony

Only serious or violent felonies count as prior strikes.

i. Petitioner in effect asks this Court, in reviewing his sentence, to focus myopically on his theft offense in isolation. (Pet. Br. 31-32; see FAMM Br. 6-8.) Given serious or violent prior convictions, however, even an initial focus on a repeat offender's newest conviction necessarily must take account of the special evil of his recidivism. Anyway, the quality of the most-recent offense is by no means the only focus of the constitutional inquiry. Cf. *Helm*, 463 U.S. at 296-297 & n. 21. This Court's precedents make it clear that Eighth Amendment review of a sentence also must take account of the defendant's larger record of prior-crimes and not just his most recent offense. *Id.*; *Rummel*, 445 U.S. at 276; *Hutto* v. *Davis*, 454 U.S. at 372 & n. 1 (per curiam), 379-380 (Powell, J., concurring); see *Harmelin*, at 1002 (Kennedy, J., concurring).

In California, the Legislature has taken a narrowed aim at felony recidivists, and then has narrowed that aim further by predicating "Three Strikes" punishment upon a record that includes "serious" or "violent" prior felony convictions. As may be seen from the descriptions of these offenses, p. 2, n. 1, *ante*, "serious" and "violent" felonies are generally defined in terms of great violence, or obvious threat of such violence, against the person. Narrowing the class of recidivists subject to the "Three Strikes" law serves Eighth Amendment values. Cf. *Arave* v. *Creech*, 507 U.S. 463, 470-476 (1993)

"strikes" necessary for "Three Strikes" punishment. Beyond those "strikes," petitioner's record included three other felonies, numerous misdemeanors, and apparent failed rehabilitation opportunities on probation, in local jails, and in state prison. Even if "double counting" were unconstitutional, a proposition petitioner does not advance, there obviously was no need to "double count" anything in order to impose petitioner's sentence in this case.

(narrowing class of death-penalty-eligible killers, required by Eighth Amendment, sufficient where "not all" are included).

ii. In this case, petitioner's "Three Strikes" record is one of grand theft with prior serious or violent convictions for robbery and multiple residential burglaries. The seriousness of the crime of robbery of a person, see Cal. Penal Code § 211, cannot be gainsaid. And both this Court and Congress have recognized the inherent potential for harm to persons posed by burglaries like the residential burglaries that count as "strikes" under the "Three Strikes" law and that in fact were committed by petitioner in the case at bar. *Taylor* v. *United States*, 495 U.S. 575, 581, 588, 598 (1990) (generic burglary as a "violent felony" under Armed Career Criminal Act of 1984); *Brown* v. *Mayle*, 283 F.3d at 1034 ("residential burglary" is a "violent felony" under the Act); see Cal. Penal Code §§ 459-460.

The three-strikes sentence allows an opportunity for parole.

i. The qualitative difference between a life prison term offering no possibility of future release and one that does is a significant one in assessing the severity of punishment for purposes of Eighth Amendment proportionality review. See *Helm*, 463 U.S. at 297; *Rummel*, 445 U.S. at 281; see also *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (life-without-parole imprisonment is like a death sentence in the apparently irreversible loss of freedom and rejection of rehabilitation). Where a prison sentence affords a possibility of release after a period of years, moreover, it becomes especially unlikely that objective factors can clearly dictate the precise line of demarcation when the duration of the ultimate sentence might become "disproportionate." As recognized in Justice Kennedy's opinion in *Harmelin*, "[O]ur decisions recognize that we lack clear objective standards to

distinguish between sentences of different terms of years." 451 U.S. at 1000-1001.[7/] When a state may impose a term of years upon a defendant for a felony offense, cf. *Robinson* v. *California*, 370 U.S. at 667, a sentence of imprisonment short of life without parole should ordinarily be upheld.

ii. It is far from clear that petitioner would be retained in prison beyond his minimum twenty-five year sentence, although respondent acknowledges that there are no guarantees and much might depend upon petitioner's own conduct in prison. As provided in the California Penal Code,

> One year prior to the inmate's minimum eligible parole release date, a panel consisting of at least two commissioners of the Board of Prison Terms shall . . . meet with the inmate and *shall normally set a release date* . . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in so doing shall consider the number of victims for the crime for which the prisoner was sentenced and other factors in aggravation or in mitigation of the crime.

Cal. Penal Code § 3041(a). Further, "[t]he panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and

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[7/] Indeed, several federal courts of appeals have concluded that a prison sentence allowing a felon a possibility of release may be upheld under the Eighth Amendment without any further scrutiny. *United States* v. *Thomas*, 49 F.3d 253, 261 (9th Cir 1995); *United States* v. *D'Anjou*, 16 F.3d 604, 612 (4th Cir. 1994); *Chandler* v. *Jones*, 813 F.2d at 779; see *Moreno* v. *Estelle*, 717 F.2d 171, 180-181 (5th Cir. 1983).

gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration . . . ." § 3041(b).

Under the Board's published regulations, the general guidelines that would inform any decision deeming an inmate "unsuitable" for parole on account of the inmate's pre-imprisonment criminal record speak of circumstances such as whether the commitment offense was committed in a "heinous, atrocious, or cruel manner," whether "multiple victims attacked, injured, or killed," whether the victim was "abused, defiled, or mutilated," whether the crime showed an "exceptionally callous regard for human suffering," whether "the motive was inexplicable or very trivial in relation to the offense," and whether "[t]he prisoner on previous occasions inflicted or attempted to inflict serious bodily injury on a victim . . ." Title 15, California Code of Regulations, § 2281. Certainly, the state would have little incentive to bear the costs of retaining petitioner in prison, beyond the twenty-five year statutory minimum, for any improper reasons unrelated to his rehabilitation.

The amicus curiae brief in support of petitioner asserts that relatively few California inmates are recommended for parole each year. (FAMM Br. 18.) That extra-record allegation cannot be referring to prisoners incarcerated under the "Three Strikes" law, for none could have served his minimum term since the law's enactment in 1994. As the brief does not identify the types of offenders who are said to have been denied parole, respondent assumes that the amicus means to refer to the Board of Prison Term's and the Governor's past practices with respect to prisoners who have committed crimes like murder, torture, and kidnaping—offenses that carried life sentences in California

long before the passage of "Three Strikes."[8/] Those crimes by their nature implicate the criteria, cited above, that would tend to work against an early grant of parole. There is no reason to suppose that "Three Strikes" defendants like petitioner will fare as poorly as murderers under the parole standards.

The statute preserves an opportunity for judicial discretion to avoid a life sentence.

i. Although its prescribed prison sentences become mandatory upon a new felony conviction and judicially-sustained findings of two prior "strikes"—as respondent has explained, see p. 15, *ante*—the California "Three Strikes" law nevertheless allows the judge an opportunity to make certain determinations, preliminary to the actual calculation and imposition of sentence, that well might operate in an individual case either to avoid the mandatory life-with-possibility-of-parole sentence or to make available a sentence re-calculated in a downward direction. As authoritatively interpreted by the California Supreme Court in *People* v. *Superior Court (Romero)*, 13 Cal. 4th at 529-532, the "Three Strikes" law affords a sentencing court guided discretion to "strike" prior-conviction findings, and in that way avoid what

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[8/] The Penal Code provides life-with-possibility-of-parole sentences for crimes such as first- and second-degree murder, §§ 187(a), 189, 190(a)-(d), 190.03, 190.05, 190.25; attempted murder, §§ 664(a), (e), 187, 189; recidivist drunk-driving vehicular manslaughter, § 191.5(d); aggravated mayhem, § 205; torture, § 206; kidnap for ransom, robbery or sex, § 209(a)-(b); carjack-kidnaping, § 209.5; gang carjacking and gang home-invasion robbery, §§ 186.22(b)(4), 211, 213(a)(1)(A), 215; train-wrecking, §§ 218-219; aggravated sex assault upon a child, § 269; child abuse causing death, § 273ab; aggravated arson, § 451.5; aggravated sexual assault, § 667.61(b); habitual criminal with great bodily injury, §§ 667.7(a)(1); habitual sex offender, § 667.71; explosion with intent to murder or cause great bodily injury, § 123.10(a)-(b); gang shooting from a vehicle causing great bodily injury or death, § 12022.55.

otherwise would then become a mandatory third-felony life sentence.

The existence of this initial discretion to consider individualized circumstances in the defendant's favor, although not required by the Eighth Amendment in a non-capital case, *Harmelin*, 501 U.S. at 994-996, nevertheless serves to ameliorate the "Three Strikes" scheme. In that way, it provides an added guarantee that a "Three Strikes" sentence will not be "grossly disproportionate." See *Harmelin,* at 1008 ("Prosecutorial discretion before sentencing and executive or legislative clemency afterwards provide means for the state to avert of correct unjust sentences.") (Kennedy, J., concurring); *Rummel*, 445 U.S. at 281 ("It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes . . . . so as to screen out truly 'petty' offenders who fall within the literal terms of such statutes."); see also Cal. Const., art. V, § 8 (executive clemency); Cal. Penal Code §§ 4800 et seq. (same).

ii. Here, of course, the trial judge indeed considered petitioner's motions to sentence his felony as if it were a misdemeanor and to "strike" one or more of the prior-felony findings. On the former question, the judge's discretion is broad and encompasses "individualized consideration of the offense, the offender, and the public interest"; and there is no "presumption" against reducing a qualifying felony to a misdemeanor in a "Three Strikes" case. *People* v. *Superior Court (Alvarez)*, 14 Cal. 4th at 977-980. On the separate question of dismissing "strikes" in "the furtherance of justice," see Cal. Penal Code § 1385(a), the judge's discretion encompasses consideration of "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part." *People* v. *Williams*, 17 Cal. 4th 148, 161, 69 Cal. Rptr. 2d

917, 948 P. 2d 429 (1998). The state courts, needless to say, faithfully carry out their obligation to exercise this discretion. E.g., *People* v. *Superior Court (Alvarez)*, 14 Cal. 4th at 980-981; *People* v. *Cluff*, 87 Cal. App. 4th 99, 1001-1004, 105 Cal. Rptr. 2d 80 (Ct. of App. 2001); *People* v. *Taylor,* 80 Cal. App. 4th 804, 813-818, 95 Cal. Rptr. 2d 357 (Ct. of App. 2000), review granted on other grounds, 6 P. 3d 668 (2000); *People* v. *Benevides*, 64 Cal. App. 4th 728, 735 n. 7, 75 Cal. Rptr. 2d 388 (Ct. of App. 1998); *People* v. *Bishop*, 56 Cal. App. 4th 1245, 1247-1251, 66 Cal. Rptr. 2d 347 (Ct. of App. 1997); *People* v. *Vessell*, 36 Cal. App. 4th 288, 297, 42 Cal. Rptr. 2d 241 (Ct. of App. 1995).

In petitioner's trial, the judge in her discretion decided not to reduce the felony or to dismiss any strikes. She relied, in particular, on petitioner's record of persistent criminal activity prior to his Long Beach "strikes" and his commission of the grand-theft felony so soon after being released from prison. J.A. 13-14. And the California Court of Appeal upheld the judge's decision as a valid exercise of the discretion afforded to her under state law. App. to Pet. for Cert. 25-28.

c. The essential components of California's "Three Strikes" law produced a proportionate sentence in petitioner's case.

Petitioner's life sentence promises the possibility of parole. It rests upon a foundation of not just one new felony, but two prior "serious" or "violent" felonies as well. Petitioner has demonstrated a propensity to commit serious and violence-related crimes, and he now has committed yet another felony that signals his insistence upon remaining on the wrong side of felony law. See *Rummel*, 445 U.S. at 283-285. Indeed, even apart from the qualifying convictions necessary to his "Three Strikes" sentence, his record comprises fifteen years of chronic recidivism including other

burglaries of elevated seriousness, another grand-theft conviction, eight misdemeanor convictions, and failed efforts at rehabilitation on probation and parole. Although state law allowed the judge discretion to ameliorate petitioner's sentence, the circumstances of petitioner's case did not warrant it.

Petitioner's sentence therefore is a proportionate one. In any event, as confirmed by a review of the above-described features of the "Three Strikes" law as they were applied in his case, his sentence certainly is not "extreme" and "grossly disproportionate."

C. Although intra- and interjurisdictional comparisons regarding petitioner's sentence are unnecessary and inappropriate, such comparisons in this case would lend no support to petitioner's constitutional attack anyway.

Because petitioner's sentence is not "grossly disproportionate" to his crime, no intra- or interjurisdictional comparisons regarding his sentence are necessary. Nor are such comparisons ever really appropriate. As argued above, see pp. 17, 21, *ante*, it is problematic for a court to scrutinize, in competition with the legislature, the relative seriousness of individual crimes and, even less tenable, to re-assess the weight assignable to the evil of felony recidivism. That task becomes even more complex and precarious when a court attempts to equate the varied bases and justifications for recidivist or non-recidivist sentences within a state and across the Nation, and to compare myriad statutory provisions in "complex matrices." In our federal system different states are allowed to pursue different penological goals given different local conditions. *Harmelin*, 501 U.S. at 989 (op. of Scalia, J.), 998-999 (Kennedy, J., concurring). The anti-legislative and anti-federalism risk implicated by such judicial scrutiny

counsels, at the least, prudent restrictions on the scope and the use intra- and interjurisdictional comparisons as a means of overriding legislative choices.

Here, even if the Court were to undertake the intrajurisdictional and interjurisdictional comparisons, petitioner's "Three Strikes" sentence in this case still should stand. Cf. *Solem* v. *Helm*, 463 U.S. at 311 n. 3 (Burger, C.J., dissenting) (deference unless reasonable persons could not differ as to inappropriateness of a punishment).

1. An intrajurisdictional analysis discloses no meaningful disparities wrought by the "Three Strikes" law.

a. Intrajurisdictional comparisons, if undertaken at all, should be limited to determining whether the challenged sentence is so aberrational as to represent a manifest or virtual malfunction of the legislature's intended sentencing scheme. The origin of intrajurisdictional comparisons may be traced to *Weems* v. *United States*, 217 U.S. 349, which suggests the limits of their usefulness. In *Weems*, a case arising from the Philippines, this Court compared the lengthy, painful, and unusual punishment of *cadena* for the offense of making a false entry in an official record with other punishments prescribed for similar offenses by Congress and the United States Philippine Commission. *Id.* at 380-381. But *cadena* was literally a foreign interloper that had "no fellow in American legislation" and that "amaze[d] those who . . . formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths." *Id.* at 365-366, 377. It was prescribed by "the Penal Code of Spain," *id.* at 363, which was "in nominal existence" when the Americans arrived in the Philippines and which was allowed to continue in operation by what inferably was an emergency "military order"; as the Court suggested,

"[i]t may be there was not and could not be a careful consideration of its provisions and a determination to what extent they accorded with" American legal principles. *Id.* at 368. As an artifact of the Spanish monarchy, *cadena* illustrated "the difference between unreserved power and that which is exercised under the spirit of constitutional limitations." *Id.* at 381. It therefore could be adjudged an extreme aberration that contradicted the spirit and intended operation of the pertinent legislature's plan.

Similarly, in *Solem* v. *Helm*, the Court's intrajurisdictional analysis turned up the distinct possibility that the individual judge had exercised his discretion to impose a life-without-parole sentence even though no "habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes." 463 U.S. at 299. The Court therefore inferred that, under the state's law, recidivists like the defendant ordinarily would receive more lenient treatment than the life sentence "generally" reserved for other types of recidivists. *Id.*; see also *Enmund* v. *Florida*, 458 U.S. 782, 795-796 (1982) (lone state defendant sentenced to death for felony murder as non-killer with no intent to kill); *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (punishment unconstitutional when imposition is freakish like being "struck by lightning"). There can be little doubt that, despite petitioner's allegations of anomalies in California's sentencing provisions, the California Legislature intended the challenged operations of its "Three Strikes" law and that, as petitioner points out, the law indeed has been applied to many recidivists with new offenses like petitioner's. (Pet. Br. 23.)[9/]

[9/] That does not mean that most of those incarcerated under the "Three Strikes" law had committed new theft or "property" offenses. (Pet. Br. 22-23.) To the contrary, recent statistics show that third-strikers in prison in California include 294 for murder, 34 for manslaughter, 1,408 for robbery, 356 for assault with a deadly weapon, 416 for other assaults or battery, 136 for rape, 241 for lewd act upon a child, 136 for other sex offenses, 83 for kidnaping, 776 for residential burglary, 288 for possession of drugs for sale, 191 for sale of drugs, 28 for manufacturing drugs, 356 for weapons-possession, and 25 for arson. See CAL. DEPT. OF CORRECTIONS, SECOND AND THIRD STRIKERS IN THE INSTITUTIONAL POPULATION, Table 1(Mar. 31, 2002).

b. Beyond its capacity to aid in identifying such malfunctions of the legislature's intended system, intrajurisdictional analysis logically can reveal little more than mere asymmetry in a state's punishment scheme. Given the fits-and-starts, backing-and-filling nature of the legislative process over time, asymmetry should hardly raise a constitutional red flag. The legislature rationally may deal with social problems in such fashion. See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) ("strict" proportionality not required); see also *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

Thus, petitioner's complaint that his three-strikes punishment would not have been triggered if he had committed his crimes in a different sequence (Pet. Br. 36) discloses no unconstitutional infirmity in the California scheme. Moreover, it is not anomalous to first require the establishment of a track record of multiple serious or violent felonies before drawing a line against the increased threat to the community that becomes apparent when a multiple serious or violent offender thereafter persists in committing more felonies. In contrast, and despite the suggestion in the amicus curiae brief, it would be a strange value system that could celebrate a repeat offender's commission of any new felony as "moving in the *right direction*." (FAMM Br. 8 [emphasis added].)

c. If an intrajurisdictional analysis were undertaken in this case, there would be little reason to compare petitioner's sentence with those prescribed for non-recidivists. In light of the diminished prospects for rehabilitation and diminished reasons for leniency, as well as other reasons to treat repeat offenders differently, recidivists and non-recidivists are not similarly situated. Here, comparing petitioner's sentences with other recidivist-based sentences yields no corroboration for his claim of gross disproportionality.

Under the "Three Strikes" law, the applicable third-strike term increases depending upon the sentence ordinarily prescribed for the current crime and upon whether the defendant is subject to other sentencing enhancements. For example, if a third-strike defendant's new conviction ordinarily could be punishable by a maximum term of nine years rather than the three-years maximum for grand theft—e.g., Cal. Penal Code § 182 (conspiracy to commit crime against the person), § 193 (voluntary manslaughter), § 213 (robbery of dwelling in concert), § 215 (carjacking), § 269 (aggravated sexual assault on a child), § 451 (arson causing great bodily injury), § 12022.3 (use of firearm in committing specified felonies); Cal. Health & Safety Code § 11353.5 (selling drugs to children at school)—the judge may select that term as the appropriate one. The "Three Strikes" law then would operate to triple that term, for a sentence of twenty-seven years to life. *Id.* § 667(e)(2)(A)(i). That minimum term itself will be increased further for qualifying prior convictions. E.g., *id.* § 667(a) (five-year enhancement), § 667.5(b) (one year for prior prison term). Indeed, given the added five-year-per-prior-conviction enhancement provided by section 667(a) of the California Penal Code, a third-strike defendant with a new conviction for a "serious" or "violent" felony will always be subject to a greater sentence than a third-striker whose new felony is not

"serious" or "violent." See *People* v. *Dotson*, 16 Cal. 4th 547, 555-559, 66 Cal. Rptr. 2d 423, 941 P. 2d 56 (1997).

Similarly, the minimum term for a life sentence imposed on a third-strike defendant convicted of non-capital murder would be either forty-five years or seventy-five years, rather than petitioner's minimum twenty-five-year term. Cal. Penal Code §§ 190(a), 667(e)(2)(A)(i). And, under an available "Three Strikes" law calculation based upon ordinary sentence-enhancing factors, a first-degree non-capital murderer who used a firearm in the killing would receive a total sentence of at least 110 years in prison as a third-strike defendant. *Id.* §§ 190(a), 667(a), 667(e)(2)(A)(i), 12022.53(d). A felon with two prior "strikes" who commits second-degree robbery with the firing of a gun would receive a minimum indeterminate term of thirty-five years to life, plus thirty more years in sentence enhancements. *Id.* §§ 213, 667(a), 667(e), 12022.53. So, it is incorrect to say (see Pet. Br. 42) that the "Three Strikes" law is a "one size fits all" scheme that does not take into account the nature of the newest conviction.

Petitioner, in the same vein, says that his recidivism "enhancement" is drastically disproportionate to the one-year and three-year enhancements imposed for use of a weapon in committing a felony. (Pet. Br. 33-34.) But petitioner ignores some lengthy firearm-use enhancements provided by section 12022.53 of the California Penal Code. That provision requires an added ten-years enhancement for using a gun in committing many felonies, twenty years for firing the gun, and twenty-five years to life for wounding with it. And other California sentencing schemes provide for life terms comparable to those provided in the "Three Strikes" scheme. E.g., Cal. Penal Code §§ 667.61, 667.7, 667.71 (sex offenses and offenders).

Petitioner also says that other state-law recidivist enhancements "maintain a discernable proportional relationship" between the recidivism punishment and the ordinary non-recidivism punishment for the new offense. (Pet. Br. 41-42.) Upon closer inspection, it appears that petitioner means merely that some California statutes add a certain number of years to the normal sentence for each prior offense, and that a "two strikes" sentence doubles the ordinary sentence. (*Id.*) The proposed principle, however, seems illusory. Insofar as a state might add a number of years for each prior conviction, there would appear to be no mathematical relationship between the total of the enhancements and the new triggering offense at all; further, there would appear to be no mathematical restriction if the state decided to drastically increase the length of such enhancements themselves. Similarly, there appears to be no reason inherent in the suggested "discernable proportional relationship" principle that would prevent a state from punishing a new repeat offense by a three-striker by a multiplier of more than three. Respondent notes that, in *Rummel*, this Court upheld the life-imprisonment sentence upon a new offense that otherwise would have carried a sentence of two-to-ten years. 445 U.S. at 266. Again, as observed in *Harmelin*, courts "lack clear objective standards to distinguish between sentences of different terms of years." 451 U.S. at 1000-1001 (Kennedy, J., concurring).

The amicus brief filed in support of petitioner likewise suggests that recidivist punishment must be proportionate only to the new offense, without regard to recidivism, lest the defendant's right against double jeopardy be infringed. (FAMM Br. 7.) But this Court has recognized that the proportionality of recidivist punishment is a function of the defendant's broader record, *Helm*, at 296-297 & n. 21; *Rummel*, at 285; that recidivist punishment is generally consistent with the Double Jeopardy Clause, *Parke* v. *Raley*,

506 U.S. at 26-28; *Spencer* v. *Texas*, 385 U.S. at 560; and that double-jeopardy rights are not violated where a sentence taking into account other criminal activity is within the statutory maximum, see *Witte* v. *United States*, 515 U.S. 389, 404 (1995).

2. An interjurisdictional analysis shows that California's "Three Strikes" law produces results sufficiently similar to that of a significant number of other states.

California's "Three Strikes" law and petitioner's sentence, finally, comport with the law and modern trends in the laws of the other states.

a. Grand theft, the crime for which petitioner was convicted as a "third-striker," has traditionally been "classifiable and classified" as a felony. See *Rummel*, 445 U.S. at 268-269, 274. Though defined in somewhat different ways across the country, it is typically a felony in virtually all fifty states and typically carries a punishment of significant time in prison in excess of a year. See *Atkins* v. *Virginia*, 122 S. Ct. at 2247 (state legislatures are best expositors of contemporary standards); Appendix B. Petitioner's grand theft of property worth $1,200, moreover, would be a felony in almost all other American jurisdictions. Appendix B. Grand theft involving that amount—even without consideration of recidivism—is punishable by as much as ten years in prison in thirteen others states and, in five of those states, by as much as fourteen, fifteen, or twenty years. *Id.* California's grand-theft cutoff amount of $400 is itself in the mainstream, in that approximately one-half of the states consider theft of property in the range of $200 to $500 to be a felony subject to significant imprisonment, very often well in excess of one year. *Id.*

b. More important, as many as twenty-four other states in the last decade have enacted similar laws broadening the class of new offenses that trigger pre-existing recidivist provisions, expanding the definition of prior offenses serving as a predicate for enhanced recidivist punishment, and increasing the lengths of recidivist sentences themselves. NATIONAL INSTITUTE OF JUSTICE, "'THREE STRIKES AND YOU'RE OUT': A REVIEW OF STATE LEGISLATION," 7-9 (September 1997). The adoption of "Three Strikes"-type legislation in these states indicates a broad and contemporary consensus approving the notion of greatly increased prison terms for felony recidivists. See *Atkins* v. *Virginia*, 122 S. Ct. at 2247. This re-confirmation is not only "dramatic," but also significant in "the consistency of the direction" of the overall trend, see *id.* at 2423—toward longer prison sentences for felony recidivists.

c. In addition, it appears that legislation in six other states also would permit or require life sentences, literal or in effect, comparable to petitioner's on the basis of his "Three Strikes" law offenses: Alabama (mandatory term of twenty-years or life); Montana (mandatory term of ten-to-100 years); Nevada (mandatory term of life-without parole, ten-years-to-life, or twenty-five-years-to-life); Oklahoma (punishable by term of four-years to life); South Dakota (mandatory life imprisonment); and Vermont (punishable by imprisonment "up to and including life").[10/] Indeed, given petitioner's 1984 grand theft conviction in Ohio, J.A. 4; see Ohio Rev. Code

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[10/] See Ala. Code §§ 13A-8-3, 13A-5-6, 13A-5-9; Mont. Code Ann. §§ 45-6-301, 46-18-501, 46-18-502; Nev. Rev. Stat. §§ 193.130, 205.060(4), 205.0832, 205.0835, 207.010, 207.012; Okla. Stats. tit. 21, §§ 51.1, 1701-1705; S.D. Cod. Laws, §§ 22-1-2, 22-6-1, 22-7-9, 22-30A-1, 22-30A-17; Vt. Stats. Ann. tit. 13, §§ 11, 2501; see also Ark. Code §§ 5-36-103, 5-4-401, 5-4-501 (three to thirty years); La. Rev. Stat. Ann. §§ 14:67.10, 529.1(A)(1)(c)(i) (six to twenty years); Mo. Ann. Stat. §§ 558.011, 558.016 (twenty years).

Ann. § 2913.02, petitioner also would be subject to a life sentences under the laws of Idaho (mandatory term of five-years to life) and West Virginia (mandatory life term).[11/] Similar to California, the statutes of South Dakota and West Virginia would have made a life sentence mandatory. In addition, the recidivist statute in effect in Louisiana at the time of petitioner's latest felony would have required a life sentence too.[12/]

[11/] Id. Code § 19-2514; W. Va. Code §§ 61-3-13, 61-11-18. Although West Virginia courts may invoke the state's constitution to refuse to enforce the life sentence mandated by the legislature, it would be merely speculative to conclude that petitioner's record would be deemed insufficient by the courts in that state. See *State* v. *Evans*, 203 W. Va. 446, 450, 508 S.E.2d 606, 610 (W. Va. 1998); *State* v. *Housden*, 184 W. Va. 171, 174, 399 S.E.2d 882, 884-886 (W. Va. 1990); but see *State* v. *Miller*, 184 W. Va. 462, 400 S.E.2d 897 (1990).

[12/] La. Rev. Stat. Ann. § 15.529.1 (2000). Although it is true that Louisiana in 2001 amended its recidivist statute so that a court today would not impose a life sentence for a defendant with a record similar to petitioner's (Pet. Br. 49), the amending legislation itself provided that the change in the provision "shall only have prospective effect." La. Acts 2001, No. 403, §§ 2, 6. So, regardless of the change in the law and the reasons for it, the Louisiana Legislature continues to endorses mandatory life terms for defendant like petitioner, whose sentences remain governed by the prior law and operative under it. See *Atkins* v. *Virginia*, 122 S. Ct. at 2261-2262 (Scalia, J., dissenting); *State* v. *Jackson*, 812 So. 2d 139, 144-148 (La. Ct. of App. 2002).

Petitioner says that Louisiana courts would have subjected his legislatively-mandated sentence to scrutiny under that state's constitution. (Pet. Br. 50 n. 29.) But the cases he cites, *State* v. *Hayes*, 739 So. 2d 301 (La. Ct. of App. 1999), and *State* v. *Burns*, 723 So.2d 1013 (La. Ct. of App. 1998), do not support a conclusion that the state courts would have overturned petitioner's sentence in the circumstances of this case. Those cases involved life-without-parole sentences; and they were cases in which individual characteristics of the defendant, beyond the absence of violence in the defendant's record, tipped the scales in the courts' estimation. The pre-1998 cases cited in the amicus brief in support of

Respondent, of course, does not claim that California's recidivist law represents the mean. If the true aim of interjurisdictional analysis is to determine whether a sentence is "grossly disproportionate," the court should not focus on the degree to which petitioner's sentence might depart from the norm but only upon whether it is beyond the ken. Here, interjurisdictional analysis does not show California's law to be so extreme in comparison with the laws of the other states as to validate any inference of "gross disproportionality." It shows, if anything, that the "Three Strikes" law's life-with-possibility-of-parole term is reasonably similar to the prison terms, especially the maximums, allowed or mandated by the legislatures in approximately fifteen to twenty percent of the states.

c. Nor should judicial scrutiny involve analysis of myriad details of sentencing practices varying across the states. See *Harmelin*, 501 U.S. at 1004-1005 ("'a reviewing court rarely will be required to engage in extended analysis to determine that a sentenee is not constitutionally disproportionate.'") (Kennedy, J., concurring.) Nuances such as transitory parole practices, for example, would not significantly alter a state legislature's fundamental approval of a prison sentence like petitioner's based at its core upon a similar series of offenses. The same logically may be said about credits a defendant might earn against his sentence by his rehabilitative conduct well after his crime and the pronouncement of sentence.

In *Atkins* v. *Virginia*, for example, this Court found noteworthy the general thrust of recently-enacted state laws specifically prohibiting the execution of mentally retarded killers. It did not inquire into any potential consensus among

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petitioner (FAMM Br. 24-25 & n. 21) seem to have become obsolete in light of the Louisiana Supreme Court's later clarifications restricting the scope of judicial scrutiny. See *State* v. *Lindsey*, 770 So.2d 339, 342 (La. 2000); *State* v. *Johnson*, 709 So. 2d 672, 676-678 (La. 1998).

the states with respect to the precise combination of details comprising their various definitions of mental retardation itself; in refraining from providing more than general guidance on that subject, the Court signaled to the states that they would be allowed latitude to work out such details for themselves in the federal system. 122 S. Ct. at 2250 & n. 22. As indicated in *Rummel*, there is a high level of impracticality in attempting comparisons across the many "complex matrices" that comprise the sentencing features in the laws of any set of states. 445 U.S. at 280. In the end, differences in such matrices between California's scheme and those of the other states cited by respondent are merely "subtle" rather than "gross." See *id.* at 279.

Although his brief elsewhere ignores minimum terms when they do not suit his argument (Pet. Br. 10), petitioner notes differences between the minimum term imposed under the "Three Strikes" law and lower minimum terms associated with the recidivist sentences respondent has ascribed to some of the other states providing for life sentences in circumstances like petitioner's (*id.* at 48-52.)[13/] See *Rummel*, at 281. But the most important point of comparison should be the maximum terms deemed appropriate by the state legislatures; the fact that the legislation of other states might provide for minimum terms less than California's does not detract from the fact that the cited state legislatures nevertheless have approved life sentences for recidivists in petitioner's circumstances. Moreover, just as respondent has acknowledged that there are no guarantees about petitioner's release on parole, see p. 31, *ante*, petitioner does not show

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[13/] Petitioner says that his hypothetical counterpart would be eligible for parole after ten years if sentenced to life imprisonment in Alabama; that there would be no minimum term in South Dakota; that he would be eligible for parole after six months in Vermont; and that the minimum term in Oklahoma would be four years. (Pet. Br. 48-53.)

that defendants like him would serve only the minimum term, or anything close to it, in other states. See *id.* at 280 ("We agree with Rummel that his inability to enforce any right to parole precludes us from from treating his life sentence as if it were equivalent to a sentence of 12 years.").

Anyway, petitioner's argument in this regard, while playing up hypothetical possibilities of lesser sentences in other states, ignores that he also had an opportunity under the "Three Strikes" law in this case to seek dismissal, in the court's guided discretion, of one or more of his "strikes" and a reduction of the status of his grand-theft offense from a felony to a misdemeanor. These California sentencing options could have produced lesser sentences sufficiently equivalent to the minimum terms emphasized by petitioner in his discussion of the sentencing laws of the other states.

d. One cannot plausibly maintain that, to the extent other states' recidivist schemes differ from California's, there has developed a consensus specifically repudiating California's approach as intolerable. Thus, in *Atkins*, other states had recently changed their death-penalty laws for the specific purpose of shielding the mentally retarded from capital punishment. Here, in contrast, there is no evidence that many other states have now changed their recidivist laws with the specific purpose of differentiating them from California's in the respects that petitioner here challenges. Nor could one confidently infer, from a state's fixing of a prison sentence at one level, that it meant to voice actual condemnation of fixing it, as a matter of degree, at any other level.

e. Finally, the fact that California's law might be harsher than those of other states could not by itself mean that it is "grossly disproportionate" and unconstitutional. *Harmelin*, 501 U.S. at 990 (Scalia, J.), 1000 (Kennedy, J.); *Rummel*, 445 U.S. at 281-282. Given the deference due to the legislature's judgment on the problem of felony recidivism, the essential features of the "Three Strikes" law that help guarantee the

reasonableness and proportionality of its recidivist sentencing scheme, its harmony with other state sentencing provisions, and its general kinship with the approach of other states in dealing with the problem of recidivism, there are no grounds for invalidating petitioner's sentence as "grossly disproportionate." His sentence is constitutional.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Dated: August 1, 2002

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APPENDIX A

Pertinent provisions of sections 667.5 and 1192.7 of the California Penal Code

Section 667.5 defines "violent" felonies as follows:

(c) For the purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.
(2) Mayhem.
(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(6) Lewd acts on a child under the age of 14 years as defined in Section 288.
(7) Any felony punishable by death or imprisonment in the state prison for life.
(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5, or 12022.55.
(9) Any robbery.

(10) Arson, in violation of subdivision (a) or (b) of Section 451.
(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(12) Attempted murder.
(13) A violation of Section 12308, 12309, or 12310.
(14) Kidnapping.
(15) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.
(16) Continuous sexual abuse of a child, in violation of Section 288.5.
(17) Carjacking, as defined in subdivision (a) of Section 215.
(18) A violation of Section 264.1.
(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.
(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
(22) Any violation of Section 12022.53.
The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

Section 1192.7 defines "serious" felonies as follows:

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2)

of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; (28) any felony offense, which would also constitute a felony violation of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machine gun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or penetration by a foreign object in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) terrorist threats, in violation Section 422; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; and (41) any conspiracy to commit an offense described in this subdivision.

APPENDIX B

State Felony-Theft Statutes and Prescribed Punishments

Alabama. Ala. Code §§ 13A-5-6, 13A-8-3, 13A-8-4 (Class B felony if property exceeds $1000, punishable by 2-to-20 years imprisonment. Class C felony at $250 level, punishable by 1-to-10 years).

Alaska. Alaska Stats. §§ 11.46.100, 11.46.130, 12.55.125(e) (Class C felony if property exceeds $500, punishable by up to five years).

Arizona. Ariz. Rev. Stats. §§ 13-604, 13-702, 13-802 (Class 5 felony if property exceeds $1000; 9 months to two years in prison. Class 6 felony for property of $250-$1000, punishable by six months to one and one-half years).

Arkansas. Ark. Code §§ 536-103, 5-4-401 (Class C felony if property exceeds $500; 3-to-10 years).

Colorado. Colo. Rev. Stats. § 18-4-401 (Class 4 felony if property exceeds $500; 2-to-6 years).

Connecticut. Conn. Gen. Stats. §§ 53a-119, 53a-124 (Class D felony if property exceeds $1000; 1-to-5 years).

Delaware. Del. Code. Ann. § 841 (Class G felony if property exceeds $1000; up to two years imprisonment).

District of Columbia. D.C. Code Ann. §§ 22-3211, 22-3212 (first-degree theft if property exceeds $250; up to ten years).

Florida. Fla. Stat. Ann. §§ 775.082, 812.014 (third-degree grand theft if property exceeds $300, up to five years).

Georgia. Ga. Code Ann. § 16-8-2 (if property exceeds $500; 1-to-10 years (or as misdemeanor)).

Hawaii. Haw. Rev. Stats. §§ 706-660, 708-830, 708-831 (Class C felony if property exceeds $300; up to five years).

Idaho. Idaho Code §§ 18-204, 18-207, 18-208 (grand theft if property exceeds $1000; 1-to-14 years).

Illinois. 720 Ill. Comp. Stats. 5/16-1, 5/5-8-1 (Class 3 felony if property exceeds $300; 2-to-5 years).

Indiana. Ind. Code §§ 35-43-4-2, 35-50-2-7 (Class D felony if property under $100,000; 6 months to three years).

Iowa. Iowa Code §§ 714.1, 714.2 (Class D felony if property exceeds $1000; up to five years).

Kansas. Kan. Stat. Ann. § 21-3701 (non-person felony theft, severity level 7, if property exceeds $500).

Kentucky. Ky. Rev. Stats. Ann. §§ 514.030, 532.020, 532.060 (Class D felony if property exceeds $300; 1-to-5 years).

Louisiana. La. Rev. Stats. Ann. § 14:67.10 (theft, punishable by up to 10 years if property exceeds $500).

Maine. Me. Rev. Stats. Ann., tit. 17-a, §§ 353, 362, 1252 (Class C crime if property exceeds $1000, up to 5 years).

Maryland. Md. Code Ann., art.27, §§ 341-342 (felony theft if property exceeds $500, up to 15 years).

Massachusetts. Mass. Gen. Laws, ch. 266, § 30 (larceny, punishable up to five years if property exceeds $250).

Michigan. Mich. Comp. Laws Ann. § 750.356 (felony larceny punishable by no more than 5 years if property exceeds $1000).

Minnesota. Minn. Stats. § 609.52 (theft, punishable by maximum of 5 years if property exceeds $500).

Mississippi. Miss. Code Ann. § 97-17-41 (grand larceny if property exceeds $250; up to 5 years).

Missouri. Mo. Ann. Stats. § 570.030 (Class C felony if property exceeds $750, no more than 7 years).

Montana. Mont. Code. Ann. § 45-6-301 (if property exceeds $1000, 10 years maximum).

Nebraska. Neb. Rev. Stats. §§ 28-510, 28-511, 28-518 (Class IV felony if property exceeds $500; five years maximum).

Nevada. Nev. Rev. Stats. §§ 205.0832, 205.0835 (Category C felony if property exceeds $250; 1-to-5 years).

New Hampshire. N.H. Rev. Stats. Ann. §§ 637:3, 637:11, 651:2 (Class A felony if property exceeds $1000, 15 years maximum. Class B felony at $500-$1000, punishable by up to seven years).

New Jersey. N.J. Stats. Ann. §§ 2C:20-2, 2C:43-6 (third-degree theft if property exceeds $500; 3-to-5 years).

New Mexico. N.M. Stats. Ann. §§30-16-1, 31-18-15 (fourth-degree felony if property exceeds $250; 1.5 years).

New York. N.Y. Pen. Law §§ 155.05, 155.030, 155.035, 155.070 (grand larceny, Class E felony, if property exceeds $1000; up to 4 years).

North Carolina. N.C. Gen. Stats. §§ 14-70, 14-72 (Class H felony if property exceeds $1000 (4-to-25 months).

North Dakota. N.D. Cent. Code §§ 12.1-23-01, 12.1-23.02, 12.1-23-05 (Class C felony if property exceeds $500; 5 years maximum).

Ohio. Ohio Rev. Code Ann. §§ 2913.02, 2929.14 (fifth-degree felony if property exceeds $500 (6 months to 1 year).

Oklahoma. Okla. Stats., tit. 21, §§ 1701, 1703, 1704 (grand larceny if property exceeds $500; 5 years maximum).

Oregon. Or. Rev. Stats. §§ 164.055, 164.065 (Class C felony if property exceeds $750; 5 years maximum).

Pennsylvania. Pa. Cons. Stats. Ann., tit. 18, §§ 3903, 3921 (first-degree *misdemeanor*; 5 years).

Rhode Island. R.I. Gen. Laws §§ 11-41-1, 11-41-5 (if property exceeds $500, 10 years maximum).

South Carolina. S.C. Code Ann. § 16-13-30 (grand larceny if property exceeds $1000; 5 years maximum).

South Dakota. S.D. Cod. Laws §§ 22-6-1, 22-30A-1, 22-30A-17 (Class 4 felony grand theft if property exceeds $500; 10 years maximum).

Tennessee. Tenn. Code Ann. §§ 39-14-103, 39-14-105, 40-35-102, 40-35-111 (Class D felony if property exceeds $1000, punishable by 2-to-4 years. Class E felony at $500-$1000, punishable by 1-to-2 years).

Texas. Tex. Penal Code Ann. §§ 12.21, 31.03 (Class A *misdemeanor* for $500-$1500 property; no more than one year).

Utah. Utah Code Ann. §§ 76-3-203, 76-6-404, 76-6-412 (third-degree felony if property exceeds $1000; 5 years maximum).

Vermont. Vt. Stats. Ann., tit. 13, § 2501 (grand larceny if property exceeds $500; 10 years maximum).

Virginia. Va. Code. Ann. § 18.2.95 (grand larceny if property exceeds $200; less than 12 months in jail or 1-to-20 years in prison).

Washington. Wash. Rev. Code §§ 9A.56.020, 9A.56.040, 9A.56.510, 9A-56-515 (Class C felony if property exceeds $250; up to 29 months in prison).

West Virginia. W.Va. Code § 61-3-13 (grand larceny if property exceeds $1000 (up to one year in jail or 1-to-10 years in prison).

Wisconsin. Wisc. Stats. § 943.20 (Class A *misdemeanor* if property less than $2500; 9 months maximum).

Wyoming. Wyo. Stats. Ann. § 6-3-403 (if property exceeds $500, 10 years maximum imprisonment).

No. 01-6978

Supreme Court U.S.
FILED
SEP 4 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GARY ALBERT EWING,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal for the State of California Second Appellate District

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REPLY BRIEF FOR PETITIONER

Because much of the briefing submitted by respondent and its amici fails to address the question presented, it is important to emphasize what this case is, and is not, about. This case is not about whether a defendant's prior criminal record can be considered in imposing sentence for the current crime. Clearly, it can be. *E.g.*, *Witte v. United States*, 515 U.S. 389 (1995).

This case is also not about whether all recidivist statutes are unconstitutional. Clearly, they are not. *See Spencer v. Texas*, 385 U.S. 554, 559 (1967). For example, there could be no serious Eighth Amendment challenge to the federal "Three Strikes" law, 18 U.S.C. § 3559(c), which reserves a sentence of life without parole for those who commit a "serious violent felony" after having been convicted of two or more equally serious felonies. *See Solem v. Helm*, 463 U.S. 277, 299 n.26 (1983).

Nor is this case about the constitutionality *vel non* of the California Three Strikes law. Application of that law to repeat offenders who commit a violent or otherwise serious felony would not result in a constitutionally excessive sentence.

Instead, this case is about Mr. Ewing's constitutional challenge, like that of the defendant in *Helm*, to "his own sentence." 463 U.S. at 299 n.26. Specifically, petitioner challenges his sentence of life imprisonment with no possibility of parole for a minimum of twenty-five years, for a crime—stealing three golf clubs—that the State itself designates as neither serious nor violent. Even accounting for petitioner's recidivism, this application of the Three Strikes law has produced a sentence that is grossly disproportionate to Mr. Ewing's offense, and is therefore unconstitutional.[1]

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[1] The success of Mr. Ewing's Eighth Amendment challenge to his sentence will not void the California Three Strikes law. The California law specifically provides that if the law's application to any person is held

I. ALL CRIMINAL SENTENCES ARE SUBJECT TO JUDICIAL REVIEW FOR GROSS DISPROPORTIONALITY

This Court has held that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., conc.) quoting *Helm*, 463 U.S. at 288, 303. Respondent and its amici would effectively write this Eighth Amendment protection out of the vast majority of cases. They suggest that if the punishment imposed on a repeat offender is other than death or life imprisonment without possibility of parole, it cannot be excessive. They base this argument not on any limiting language in the Eighth Amendment, but on the suggestion that evaluating the disproportionality of sentences is judicially unmanageable and inconsistent with the deference owed to state legislatures. *See* U.S. amicus Br. 11, 18-19; Resp. Br. 21-22.

The Court should reject this argument. First, the Eighth Amendment's proscription against cruel and unusual punishment and excessive fines applies to all sentences: "no penalty is *per se* constitutional." *Helm*, 463 U.S. at 290. Thus, the Court has held that fines and punitive forfeitures in criminal cases are subject to judicial review under the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish"). Similarly, the Court has held that punitive damages in civil cases must be reviewed for excessiveness under the Due Process Clause. *BMW v. Gore*, 517 U.S. 559, 562 (1996). It would be anomalous, to say the least, if the Constitution required courts to protect individuals and corporations against

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invalid, that invalidity shall not affect any other application. See Cal. Penal Code § 667(i).

constitutionally excessive penalties affecting their pocketbooks, but left those courts powerless to evaluate whether imprisonment for a fixed term of years, potentially extending to life in prison, was excessive, no matter how slight the triggering offense or pattern of recidivism. *See Helm*, 463 U.S. at 289 ("It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not"); *id.* at 295 ("a court properly may distinguish one sentence of imprisonment from another").

Second, concerns of deference and manageability provide no basis for creating an exception to the Eighth Amendment for minimum-term sentences. In arguing to the contrary, respondent and amicus United States overlook that it was these two factors that led the Court to *adopt* the highly deferential and structured "gross disproportionality" standard itself, rather than, for example, a more intrusive standard that would have required that all sentences be strictly proportional to the underlying offense. *See, e.g., Harmelin*, 501 U.S. at 1001 (Kennedy, J., conc.); *Bajakajian*, 524 U.S. at 330-31.

Application of *Helm* and *Harmelin* to date further belies the State's arguments for diluting the Eighth Amendment. As of August 21, 2002, a Lexis search of federal and state cases decided during the almost twenty years since *Helm* reveals 2,592 cases which cited the decision. In only eleven of those cases, however, was the sentence held to be unconstitutional under *Helm*, and only three of these eleven were federal cases.[2] The analysis set forth in *Helm* and *Harmelin* thus has

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[2] The federal decisions are *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001); *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom. Lockyer v. Andrade*, 122 S.Ct. 1434 (2002); *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002), *cert. petition filed Mar. 7, 2002*. The state court decisions are *Ashley v. State*, 539 So.2d 1181 (Miss. 1989); *State v. Hedrick*, 391 S.E.2d 614 (W. Va. 1990); *State v. Bartlett*, 792 P.2d 692 (Ariz. 1990), *cert. granted, vacated and remanded*, 501 U.S.

evolved as a stringent test that has proved neither unworkable nor unduly intrusive on state interests.

The Court also should reject the State's related request that greater deference be accorded Mr. Ewing's sentence because it was mandated by statute, rather than chosen by the sentencer from a range of statutory alternatives. The Eighth Amendment's ban on cruel and unusual punishments is directed to the penalty actually imposed, regardless of whether it was mandated by the legislature or merely authorized within a range of statutory alternatives. *E.g.*, *Roberts v. Louisiana*, 428 U.S. 280 (1976) (mandatory penalty cruel and unusual); *Coker v. Georgia*, 433 U.S. 584 (1977) (discretionary penalty cruel and unusual).[3] In any event, every sentence that comes before the Court for review under the Eighth Amendment has effectively been authorized by the Legislature. A legislatively-authorized sentence that is grossly disproportionate to the offense of conviction cannot stand merely because the legislature made its imposition mandatory.

1246 (1991); *People v. Gaskins*, 923 P.2d 292 (Colo. Ct. App. 1996); *People v. Medina*, 926 P.2d 149 (Colo. Ct. App. 1996); *State v. Bonner*, 577 N.W.2d 575 (S.D. 1998); *State v. Jackson*, 797 So. 2d 33 (La. 2001); *Wilson v. State*, 2001 Ala. Crim. App. LEXIS 182 (2001)

[3] It is true that, in *Helm*, the Court noted that "we do not question the legislature's judgment." 463 U.S. at 299 n.26. It did so, however, only in the context of noting that Helm was not challenging the constitutionality of the South Dakota recidivist statute *per se*: "Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals." *Id.*

Respondent's reliance on statements from the plurality opinion in *Harmelin* is also misplaced. The statements were not addressed to Harmelin's claim that the sentence imposed was excessive, but rather to his separate attack on the "mandatory nature" of his sentence," *i.e.*, that "any severe penalty scheme required individualized sentencing so that a judicial officer may consider mitigating circumstances." *Harmelin*, 501 U.S. at 1006.

Furthermore, even assuming, *arguendo*, that a sentence mandated by the legislature merited greater deference than a sentence chosen by a judge, such added deference would still be misplaced in this case. As the State necessarily concedes, "[t]he statute preserves an opportunity for judicial discretion to avoid a life sentence." Resp. Br. 33. To the extent that the sentencing court refused to exercise that discretion in Mr. Ewing's case, Mr. Ewing's sentence was the choice of the court, not the legislature.[4]

Indeed, the nature and history of California's Three Strikes law reveals that this law deserves, if anything, a lesser degree of deference than would be afforded other laws. First, judicial oversight is particularly warranted because the Three Strikes law cannot be amended except by ballot initiative or by vote of a super-majority of the legislature. *See* Amicus Br. of Families to Amend California's Three Strikes Law et al., submitted in *Lockyer v. Andrade*, No. 01-1127 at 8-10. Second, the Three Strikes law was not the product of a typical

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[4] Since Mr. Ewing was denied such relief, respondent's discussion of a California court's power to reduce a wobbler to a misdemeanor (Resp. Br. 27-28) or to strike a prior conviction for purposes of sentencing (Resp. Br. 33-35) is beside the point. In any event, the sentencer's discretion to strike priors under *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996), does little to ensure proportionality. First of all, rather than the "broad" discretion stated by amicus United States (U.S. Amicus Br. 4), the California Supreme Court has stated, "we emphasize the following: a court's discretion to strike prior felony convictions in furtherance of justice is *limited*." *Romero*, 13 Cal.4th at-530 (emphasis added).

This cautionary admonition from the State's highest court may explain why judicial recognition of the power to strike priors has not significantly reduced the large percentage of California "three-strikers" whose commitment offense is a property crime. *See* Amicus Curiae Brief of the Public Defender of Los Angeles County, filed in *Lockyer v. Andrade*, No. 01-1127. Indeed, when it comes to Mr. Ewing's commitment offense, grand theft, in the six years since the *Romero* decision, there has actually been a slight increase in the number of grand theft "three-strikers" as a percentage of the total "three-striker" population. *Id.*, at 18, 20.

legislative process, with committee hearings, testimony by criminal justice system experts, fine-tuning by amendments, and other traditional measures to test the soundness of proposed legislation. *Id.*, at 5-7. Rather, written by the father of a murder victim and sponsored by the prison guards union and the National Rifle Association, it sailed through the legislative and the initiative process, in the aftermath of a particularly notorious crime and in the heat of a highly contested gubernatorial campaign. *Id.* For that reason as well, the Three Strikes law would appear to merit less deference than a more well-considered sentencing scheme, such as the United States Sentencing Commission Sentencing Guidelines or California's own Determinate Sentencing Law.

But in all events, neither the State nor its amici have advanced any valid reason for sidestepping or weakening the constitutional protection against grossly disproportionate sentences involving a term of years. The Court should therefore apply the *Harmelin* standard and evaluate whether Mr. Ewing's sentence is grossly disproportionate to his offense.

II. PETITIONER'S RECIDIVISM DOES NOT JUSTIFY A SENTENCE OF TWENTY-FIVE YEARS TO LIFE IN PRISON FOR SHOPLIFTING

Respondent and its amici cannot and do not argue that, under the *Harmelin* rule, Mr. Ewing's sentence of twenty-five-years-to-life is a constitutionally acceptable punishment for shoplifting. Such a sentence is grossly disproportionate to the relatively small "magnitude" of, and absence of "violence" in, petitioner's property crime. *Helm*, 463 U.S. at 293, 296.[5] Rather, the State and amicus United States attempt

[5] It is undisputed that the amount in question, although over the threshold for grand theft, was less than $1,200. *Cf. Helm*, 463 U.S. at 293 ("Stealing a million dollars is viewed as more serious than stealing a hundred dollars").

to defend the extraordinary harshness of Mr. Ewing's sentence by pointing to his prior criminal record.

This Court has previously rejected the argument that proportionality is determined by reference to the defendant's prior record, rather than to the defendant's current offense. Shoplifting, regardless of the offender's prior record, is still only shoplifting, and a constitutional sentence must reflect that basic fact.

Petitioner concedes, of course, that a prior record can justify some enhancement of the sentence for petitioner's current offense. *See* Pet. Br. 29. But as the Court's prior rulings make abundantly clear, the focus of the inquiry into gross disproportionality must remain upon the current offense. Nowhere does the State or amicus United States convincingly explain how a sentence of twenty-five-years-to-life can fairly be considered an "enhancement" of the state-prescribed penalty for shoplifting.

In particular, neither the State nor amicus United States contests the basic principle that the Double Jeopardy Clause precludes a state from punishing a defendant twice for the same crime. *North Carolina v. Pearce*, 395 U.S. 711, 717-18 (1969); *Brown v. Ohio*, 432 U.S. 161, 169-70 (1977). For

Respondent's amici hypothesize about the possibilities of theft escalating into potentially violent incidents. U.S. Amicus Br. 17-18 n.8; CDAA Amicus Br. 27-28. However, grand theft in the abstract—and particularly Mr. Ewing's grand theft—poses no threat of violence, as the Legislature recognized when setting the penalties for that offense. Indeed, the significance of the fact that grand theft is a "wobbler"—which the State and its amici misconstrue—is that it reflects the Legislature's judgment that the nature and relative severity of grand theft, unlike most felonies, is such that treatment as a misdemeanor can be appropriate in some cases (and likely would have been in this case, absent defendant's prior record). Moreover, should violence somehow ensue following grand theft, the defendant can properly be charged with appropriate, more serious crimes, such as robbery, for which the Legislature has established harsher penalties. *See* CDAA Amicus Br. 27.

this reason, when the Court has approved recidivist statutes, it has made clear that their validity depends upon the defendant "being punished only for the offense of conviction." *Witte*, 515 U.S. at 402; *see also Gryger v. Burke*, 334 U.S. 728, 732 (1947). Accordingly, while a state has broad latitude to adopt enhanced sentences for repeat offenders, *see Parke v. Raley*, 506 U.S. 20, 27 (1992), a sentence under a recidivist law will pass constitutional muster only as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger*, 334 U.S. at 732; *see also McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901). The Court has therefore ruled that, when a sentence imposed under a recidivist statute is evaluated for proportionality, although the defendant's "prior convictions are relevant to the sentencing decision," the Court "must focus on the principal felony—the felony that triggers the life sentence—since [the defendant] already has paid the penalty for each of his prior offenses." *Helm*, 463 U.S. at 296 n.21; *see also Coker*, 433 U.S. at 599 ("Coker had prior convictions for capital felonies—rape, murder, and kidnaping—but these prior convictions do not change the fact that the instant crime being punished is rape not involving the taking of a human life").

Given these principles, the State can justify Mr. Ewing's sentence only if it can show that the sentence is not grossly disproportionate to his theft of the golf clubs, enhanced by the fact of his recidivism. This the State fails to do. California has imposed a sentence far in excess of any penalty that could reasonably be considered a "stiffened" or enhanced penalty for Mr. Ewing's present crime of grand theft. Mr. Ewing's minimum sentence of twenty-five years is more than eight times longer than the maximum term (three years) otherwise available for the offense of grand theft. As petitioner noted in his opening brief, this is not an "enhancement" but a radical transformation of petitioner's sentence; it far exceeds the enhancement that could be imposed for other, far more

serious aggravating factors, such as inflicting great bodily injury upon the victim. *See Pet Br.* 31-32.

The eight-times "enhancement" noted above understates the true impact of the Three Strikes law on petitioner's sentence, because it compares a minimum to a maximum. In reality, petitioner's *maximum* sentence has been "stiffened" from the non-Three-Strikes absolute maximum of three years in prison to life imprisonment. Conversely, his *minimum* term of incarceration has been enhanced from the first-time offender's minimum of eight months [6] to twenty-five years. The increase from a maximum of three years in prison to a maximum of life imprisonment cannot be translated into a ratio; the increase from a minimum of eight months incarceration to a minimum of twenty-five years imprisonment results in an extraordinary ratio of 37.5 to 1 that bears no rational relationship to the severity of the underlying crime.[7] *Cf. BMW*, 517 U.S. at 581; Amicus Curiae Brief of National Association of Criminal Defense Lawyers, filed in *Lockyer v. Andrade*, No. 01-1127, at 18-20, 22-23.

The State also fails to come to grips with the extraordinary increase in Mr. Ewing's sentence as illustrated by a comparison of his sentence for the current grand theft to the sentence imposed for his prior convictions themselves. For those, Mr. Ewing received the maximum sentence available,

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[6] A first-time offender who shoplifted three golf clubs and was convicted of grand theft, if denied probation and sentenced as a misdemeanant, could receive a maximum sentence of one year in the county jail, Cal. Penal Code § 489(b), which could be reduced by one-third through good conduct/work credits to eight months, Cal. Penal Code § 4019. If sentenced as a felon and denied probation, the first-time offender would likely be sentenced to the low term of the grand theft sentencing triad, sixteen months in prison, Cal. Penal Code §§ 489(a), 1170(b), which could be reduced by one-half through good conduct/work credits to eight months, Cal. Penal Code §§ 2930-2933.

[7] To counsel's chagrin, this ratio was misstated in Petitioner's Brief on the Merits, page 23, as 19-1.

which amounted to 9 years, 8 months in prison. The State never explains why, when the Constitution concededly bars the State from re-sentencing Mr. Ewing to serve that maximum term again for those crimes, it nevertheless permits the State to rely on them to increase his sentence for stealing three golf clubs to a minimum of twenty-five years, more than two and a half times his maximum sentence for the prior, more serious crimes themselves.

Thus, when Mr. Ewing's grand theft sentence is analyzed to determine how much it has been enhanced because of his prior record, it is clear that his prior convictions proved to be not just "relevant to the sentencing decision." *Helm*, 463 U.S. at 296 n.21. Rather, unlike the prior criminal conduct in *Witte*, Mr. Ewing's prior convictions *were* the "'tail which wag[ged] the dog'" of the sentencing decision. *Witte*, 515 U.S. at 403 (quoting *McMillan v. Pennsylvania* 477 U.S. 79, 88 (1986)). In that sense, the State is right that "[t]his is, primarily, a case about felony recidivism." Resp. Br. 18. The problem for the State is that felony recidivism alone cannot justify the extraordinary transformation, rather than mere enhancement, of petitioner's sentence.

The State's heavy reliance on petitioner's recidivism is also inconsistent with the justification this Court has provided for permitting enhanced sentences based on a defendant's prior record. The reason that prior convictions are "relevant to the sentencing decision," *Helm*, 463 U.S. at 296 n.21, is that the present offense is "an aggravated offense, because a *repetitive* one." *Gryger*, 334 U.S. at 732 (emphasis added.) In the case of recidivists, it is "the *repetition* of criminal conduct [that] aggravates their guilt and justifies heavier penalties when they are again convicted." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (emphasis added); *see also Moore v. Missouri*, 159 U.S. 673, 677 (1895) (a recidivist statute "imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former

punishment has been inefficacious in doing the work of reform for which it was designed" (quoting *Plumbly v. Commonwealth*, 2 Met. (Mass.) 413)).

Thus, a recidivist receives an enhanced punishment because he has not "learned his lesson" and has broken the law again. In assessing the effect of the defendant's recidivism, the salient facts are his reoffending and the nature of his new offense. Where, as here, the present offense is markedly less serious than the prior offenses, the defendant *has* "learned his lesson" to some extent, and the fact of his reoffending, taken in this light, is less serious. On the other hand, if the present offense had been more serious than the prior crimes, the defendant's incorrigibility would be greater and his reoffending more serious.[8]

The District Attorney of Los Angeles County, the state's most populace county, has effectively conceded the point by now recognizing that, "unless used judiciously, [the Three Strikes law] has the potential for injustice and abuse in the form of disproportionately harsh sentences for relatively minor crimes." Los Angeles County District Attorneys's Office, Three Strikes Policy, dated December 19, 2000.[9] Accord-ingly, the office's policy is that, where the current offense is not a serious or violent felony or a large scale drug offense, there is a rebuttable presumption that the case will be treated as a "two strike" case, with a doubling of the sentence, rather than a minimum of twenty-five to life.[10] *Id.* The new

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[8] Paradoxically, although it would seem beyond dispute that a defendant who commits increasingly violent crimes should receive greater punishment, California law produces the opposite result. Because of its requirement that the first two strikes be violent or serious crimes, but not the third strike, a defendant whose criminal activity is escalating in violence is punished less severely than a defendant who has turned from violent crimes and committed a property offense. *See* Pet. Br. 25-26.

[9] *See* L.A.D.A. Website at http://da.co.la.ca.us/mr/2000/ 121900b.htm.

[10] Indeed, amicus California District Attorneys Association sponsored a bill, as an alternative to the present Three Strikes law, that would have

policy, which post-dates Mr. Ewing's sentencing, further underscores the grossly disproportionate nature of his sentence for shoplifting.

The State also attempts to defend Mr. Ewing's sentence as constitutional by asserting that the Three-Strikes law has been highly effective in reducing crime. The effectiveness of a state's sentencing policy, however, is irrelevant for Eighth Amendment purposes, just as the effectiveness of a police department's search-and-seizure policy is irrelevant to its constitutionality. *E.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Cruel, unusual, or excessive punishment, even if highly effective at deterring crime, is still unconstitutional.

There are, moreover, serious questions whether California's claims of success are accurate. California's crime rate has not fallen any more than the crime rates of states that have no comparable three-strikes law.[11] Similarly, a county-by-county comparison of crime rates in California from 1994-1997 revealed that more vigorous enforcement of the Three-Strikes law did not correlate with greater declines in crime.[12]

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required that the third strike be a violent or serious offense. *See* Amicus Brief of Families to Amend California's Three Strikes, *et al.*, filed in *Lockyer v. Andrade*, No. 01-1127, at 6.

[11] Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 Stan. L. Pol'y Rev. 65, 66 (1999).

[12] *Id.*, at 67-68, 70. The six counties that most aggressively applied the three-strikes law averaged a *lesser* decline in violent crime and overall index crimes than the six counties that were the least aggressive. Moreover, the county that least invoked three-strikes sentencing, San Francisco, experienced a much *greater* decline in several different crime rates than the county with the greatest enforcement, Sacramento. Males, at 67-68, 70 (citing California Crim. Justice Stat. Ctr., Cal Dep't of Justice, California Criminal Justice Profiles (annual), at tbl.22 (1994-1997)).

Finally, the State urges that Mr. Ewing may constitutionally be incarcerated for life because of his supposed violent "propensities" and likelihood of committing future crimes. But as more fully developed in the amicus brief of the National Association of Criminal Defense Lawyers, filed in *Lockyer v. Andrade*, No. 01-1127, a person may not constitutionally be imprisoned solely on the grounds of his criminal propensities or projected future crimes. NACDL *Andrade* Amicus Br. 14-17. Any prediction of future dangerousness is fraught with uncertainty. For example, as conceded by respondent's amicus Criminal Justice Legal Foundation, one study that attempted to replicate the predictive powers of the California Three Strikes law found that the law produced, on a "very conservative" basis, a "false positive" rate of one-third, *i.e.*, that one-third of those predicted to commit a future violent offense did not do so.[13] When a person's liberty is at stake, a one-third "error rate" is unacceptable.

III. BOTH INTRAJURISDICTIONAL AND INTERJURISDICTIONAL COMPARISONS CONFIRM THE GROSS DISPROPORTIONALITY OF PETITIONER'S SENTENCE

The State fails to rebut not only petitioner's threshold showing of gross disproportionality, but also petitioner's confirmation of that showing through intra- and interjurisdictional comparisons. The State's principal claim is that such comparisons are not "ever really appropriate," and should be limited to "determining whether the challenged sentence is so aberrational as to represent a manifest or virtual malfunction of the legislature's intended sentencing scheme." Resp. Br. 37. Amicus United States similarly proposes to

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[13] CJLF Amicus Br. 21, citing Burt et al., *Three Strikes and You're Out: An Investigation of False Positive Rates Using a Canadian Sample*, 64 Fed. Probation, No. 2, pp. 3, 4 (June 2000).

narrow the constitutional inquiry to whether "the sentence departs radically from sentences imposed on similarly-situated defendants in the same situation." U.S. Amicus Br. 24.

These further attempts to constrict the gross disproportionality standard find no support in the Court's precedent. *See, e.g., Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *Helm*, 463 U.S. at 291-92; *Weems v. United States*, 217 U.S. 349, 380-81 (1910). Intra- and inter-jurisdictional comparisons in this case, if done consistently with this Court's precedent, confirm that Mr. Ewing's sentence is grossly disproportionate to his offense of stealing golf clubs.

A. Intrajurisdictional Comparison

The Court has explained that the scope of an intrajurisdictional comparison is broader than what the State advocates here: "[I]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment may be excessive." *Helm*, 463 U.S. at 291. A comparison of Mr. Ewing's sentence with other sentences imposed in California shows its gross disproportionality, *i.e.*, that Mr. Ewing "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes." *Helm*, 463 U.S. at 299.

First, the only California defendants who receive a sentence as harsh as Mr. Ewing's, besides other "three-strikers," are those who have committed the most violent and/or reprehensible crimes, such as first degree murder, Cal. Penal Code § 190(a). *See* Pet. Br. 27-28. The State nowhere explains why a shoplifter, no matter his record, warrants punishment comparable only to that meted out for extraordinary crimes.

Second, California punishes many crimes that are far more serious than Mr. Ewing's, such as mayhem, torture,

kidnapping, rape, and use of a weapon of mass destruction, with sentences that are far less severe. *See* Pet. Br. 28; FAMM Br. 10-11. Again, the State fails to explain how recidivism transforms shoplifting into a crime more serious than these horrible crimes.

Third, the Three Strikes law imposes penalties that are much harsher and more disproportionate than under California's other recidivist statutes. Pet. Br. 28. For example, a felon who has a prior serious or violent offense will have his sentence for the current offense doubled, Cal. Penal Code § 667(e)(1), a reasonable enhancement for his reoffending. Thus, if Mr. Ewing were a "two-striker," he would have faced a sentence of three to six years. The State cannot explain how one additional prior strike increases the blameworthiness of his shoplifting sufficiently to justify a sentence of life imprisonment, with no parole eligibility for twenty-five years.

Finally, the law imposes an enhancement for recidivism that is far beyond that imposed for other, at least equally serious, aggravating factors. Pet. Br. 24. The State does not explain why committing grand theft while armed with a firearm or while using a deadly weapon merits no more than a one-year enhancement, Cal. Penal Code § 12022, but Mr. Ewing's recidivism warrants an enhancement of at least twenty-two years.

Amicus United States would dismiss the intrajurisdictional comparison proffered by petitioner on the grounds that it "assumes a penal code must assign central importance to retribution" as opposed to other penological goals, and by speculating that California's sentences for non-Three-Strike offenders reflect the adoption of a "rehabilitative" rather than retributive penalty scheme. U.S. Amicus Br. 10, 25; *see also* States Amicus Br. 16. It is the United States, however, that errs in its assumption. California has explicitly said that its penal code is grounded in a philosophy of retribution. Penal

Code section 1170(a)(1) states: "The Legislature finds and declares that the purpose of imprisonment for crime is *punishment*." (Emphasis added.) The Three Strikes law itself echoes this determination, stating that the legislative intent in enacting the measure was "to ensure longer prison sentences and greater *punishment* for those who commit a felony and have been previously convicted of serious and/or violent felonies." Cal. Pen. Code § 667(b)(emphasis added).

Thus, Mr. Ewing's sentence under the Three Strikes law can legitimately be compared to other California sentencing provisions. That comparison confirms that Mr. Ewing's sentence is grossly disproportionate to his commitment offense of stealing three golf clubs. Indeed, in providing that any felony conviction, regardless of its seriousness, will trigger a Three Strikes sentence of life imprisonment with parole eligibility foreclosed for at least twenty-five years, the "Three Strikes" law transgresses California's own policy determination that, just as "the purpose of imprisonment for crime is punishment," "[t]his purpose is best served by *terms proportionate to the seriousness of the offense*." Cal. Penal Code § 1170(a)(1) (emphasis added).

B. Interjurisdictional Analysis

Respondent does not dispute that, as explained in petitioner's opening brief, California is among only a handful of states in which Mr. Ewing would have been eligible to receive a life sentence, and that it is currently the only state in the nation where he would be subject to a mandatory sentence of life, with a minimum of twenty-five years in prison. Respondent disputes only one specific aspect of petitioner's interjurisdictional analysis: where we demonstrated that Mr. Ewing would be subject to a life sentence under the current laws of only five states other than California, respondent and amicus United States contend he would be so eligible in two others: Idaho and West Virginia. Resp. Br. 44-45; U.S. Amicus Br. 27-28. They erroneously assume, however, that

Mr. Ewing's Ohio conviction was for grand theft. *See* Resp. Br. 1, 44-45; *see also* CDAA Amicus Br. 19, 22. In fact, Mr. Ewing was convicted of the lesser included offense of theft, a misdemeanor of the first degree. Appendix (certified copy of entry of plea and sentencing). Thus, Mr. Ewing would not have been subject to a life sentence under either the Idaho or West Virginia statutes.

As this Court explained in *Harmelin* and *Helm*, an initial judgment of gross disproportionality can either be bolstered or rebutted by comparing "'the sentence imposed on the defendant with the sentences imposed for commission of the same crime in other jurisdictions.'" *Harmelin*, 501 U.S. at 1005 (Kennedy, J., conc.) (quoting *Helm*, 463 U.S. at 291-92). With the sole exception of its erroneous contention regarding how Mr. Ewing would have been sentenced in Idaho and West Virginia, respondent avoids the relevant analysis, and instead offers three observations that bear, at best, a tenuous relation to the pertinent inquiry.

First, relying on *Atkins v. Virginia*, 536 U.S. ___, 122 S.Ct. 2242 (2002), respondent claims that California's law passes constitutional muster because twenty-four other states have some form of three-strikes law and because no consensus has developed repudiating California's approach as "intolerable." Resp. Br. 44, 48. Citing a six-year-old study, respondent asserts that as many as twenty-four other states in the last decade have adopted "'Three Strikes'-type legislation." Resp. Br. at 44 (citing National Institute of Justice, "'Three Strikes and You're Out': A Review of State Legislation," 7-9 (Sept. 1997)). Respondent's observation is so broad as to be meaningless. In *Atkins*, this Court did not simply ask how many states generally authorized the death penalty, but rather specifically analyzed how many states barred the execution of the mentally retarded and, of the states that permitted such executions, whether the practice was uncommon. 122 S.Ct at 2249. Similarly, in *Helm*, the Court did not ask how many states had generally adopted recidivist laws, but rather

whether Helm "could" have received elsewhere the same sentence that was imposed in South Dakota and further whether those states that authorized the same maximum penalty also permitted parole. 463 U.S. at 299-300 & n. 27. In this case, the pertinent and specific answer to the interjurisdictional question is not that about half of the states have adopted some form of "'Three-Strikes' type" legislation over the last decade, but rather that Mr. Ewing would today be subject to a life sentence in only five other jurisdictions,[14] that in those jurisdictions he would be eligible for parole much sooner than in California, and that no other jurisdiction would require a mandatory minimum sentence of twenty-five years to life.

Second, what respondent characterizes as "details" of sentencing practice—parole, prison credits, and minimum terms of imprisonment—that should not be considered in the interjurisdictional comparison have, in fact, played a central role in this Court's analyses. The case principally relied on by respondent, *Rummel*, for example, explained "because parole is an established variation on imprisonment of convicted criminals, a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." 445 U.S. at 280-81. The *Rummel* court also stressed Texas' liberal policy of granting good time credits. *Ibid.* Similarly, in performing

[14] Respondent asserts that Montana should be added to this group of states because Mr. Ewing would be subject to a "mandatory term of ten-to-100 years." Resp. Br. 44. The minimum sentence Mr. Ewing would face in Montana would be five years, not ten. *See* Mont. Code Ann. § 46-18-502(1) (he was not a persistent felony offender at the time of his previous felony convictions and therefore would not be subject to § 46-18-501(2)). Moreover, the facial harshness of Montana's law is ameliorated by the fact that there are six exceptions to the mandatory minimum sentence, *id.* § 46-18-222, and a persistent felony offender, like all other prisoners, is parole eligible after serving one-fourth of the minimum sentence. *Id.* § 46-23-201(2).

the interjurisdictional analysis in *Helm*, the Court noted that while Nevada courts were authorized to impose a life sentence without the possibility of parole, a life with possibility of parole sentence was also permitted, in which case, the defendant would have been parole eligible after ten years. 463 U.S. at 300 n. 27. There is no reason to abandon examination of these objective factors that significantly affect the actual punishment imposed on Mr. Ewing and that play a critical role in evaluating the relative harshness of the punishment that would be imposed in other jurisdictions.

Finally, in light of our unrebutted demonstration that California's actual punishment of Mr. Ewing is so much harsher than the actual punishment he would likely face in any other jurisdiction in the nation, respondent wanly concludes that the fact California's law might be harsher than those of every other state would not "by itself" mean that it is grossly disproportionate. Resp. Br. at 48. True, but that fact does confirm what is otherwise evident, *i.e.*, no one, regardless of their past record, should be sentenced to a maximum of life and a minimum of twenty-five years for shoplifting three golf clubs.

Perhaps recognizing the excessiveness of the twenty-five-to-life sentence in relation to the crime being punished, stealing three golf clubs, respondent and its amici attempt to demonize Mr. Ewing, labeling him a "one-man crime wave" (CJLF Amicus Br. 17, 24) and "a bad man with a bad record" (CDAA Amicus Br. 28). Yet, contrary to the claims of amici, the only felonies on Mr. Ewing's prior record are the strikes sustained in the 1993 proceeding.[15] Mr. Ewing's 1984 Ohio

[15] As we acknowledged in our opening brief, Mr. Ewing brandished a knife in one of the burglaries (also charged as a robbery), but no one suffered physical injury in any of the 1993 offenses. In fact, although amicus United States repeatedly speaks as if he were a violent person, *e.g.*, U.S. Amicus Br. 9, 15, 22, whatever his criminal record, Mr. Ewing has never physically injured anyone.

conviction was not for felony grand theft, but for misdemeanor theft; as recognized by amicus United States (page 5 n.3), his 1988 auto theft conviction is a misdemeanor for all purposes. *See* Cal. Penal Code § 17(b)(3). Thus, a fair and accurate reading of Mr. Ewing's record reveals a relatively minor criminal history—one in which Mr. Ewing, unlike Rummel, served but a single prison term.

The most persuasive evidence belying the hyperbolic mischaracterizations of Mr. Ewing's record is the sentencing proceeding in this case. After examining Mr. Ewing's record and hearing the arguments of counsel, the sentencing judge concluded that there wasn't "a real pattern of violent crimes," and the threat Mr. Ewing posed was only "a threat for theft offenses." JA 14.

When the Court focuses, as it must, on the triggering felony, *Helm*, 463 U.S. at 296 n.21, it finds a man who, beset by AIDS, drug addiction and loss of sight in one eye, and having recently lost his mother and brother, JA 10-13, bungled his way through shoplifting three golf clubs, talking to the clerk not once but three times, disregarding the directions to the driving range the clerk provided him, and then noticeably limping out the door in the opposite direction. Mr. Ewing is anything but the master criminal respondent and its amici portray.

CONCLUSION

The Court should hold that the sentence of a minimum of twenty-five years imprisonment and a maximum of life imposed on Mr. Ewing for shoplifting three golf clubs constitutes cruel and unusual punishment under the Eighth Amendment, should vacate the judgment below, and should remand for further proceedings, including resentencing.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

January Term, 1984
Case No.: 84 CR-11-3304
Judge F. Williams

STATE OF OHIO,
Plaintiff,

vs.

GARY A. EWING,
Defendant.

Indictment for: Theft (§ 2913.02 R.C.)
(1 count)

ENTRY

In the Court of Common Pleas for the County of Franklin, State of Ohio, during the term begun on January 2, 1985.

On December 19, 1985, came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by counsel, Sharon Pfancuff.

The defendant, on December 19, 1985, pleaded guilty to a stipulated lesser included offense of Theft, a violation of Section 2913.02 R.C., a misdemeanor of the first degree.

The Court afforded Counsel an opportunity to speak on behalf of the defendant and addressed the defendant personally affording him an opportunity to make a statement in his own behalf and present information in mitigation of punishment.

The Court has considered the criteria for probation pursuant to section 2951.02 of the Ohio Revised Code and ORDERS that the execution of the confinement portion of the sentence, to wit: 6 months in the Franklin County Correction Center be suspended and the defendant be placed on probation in the charge of Tom Studebaker, Probation Officer. The suspension is to continue from this date, December 19, 1985, for a period of 3 years upon the following terms and conditions, to wit: Defendant pay restitution in the amount of $850.00 and a fine in the amount of $300.00. If he violates any one or more of the terms and conditions set out above, the suspension shall be revoked and this period of probation terminated; otherwise, the defendant shall be released from the custody of this Court upon completion of the probation period. The defendant shall also pay the costs of this prosecution and abide by the rules and regulations of the Probation Department.

/s/ Frederick T. Williams
FREDERICK T. WILLIAMS
Court of Common Pleas
Franklin County, Ohio

IGRC (6m) FCCC/Prob 3y/
costs/rest/fine

[SEAL]

(8)

Supreme Court, U.S.
FILED
JUL 31 2002
OFFICE OF THE CLERK

No. 01-6978

In the Supreme Court of the United States

GARY ALBERT EWING, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioner's sentence under California's Three Strikes Law to a term of 25 years to life imprisonment for grand theft, after previously having been convicted of numerous offenses including at least two violent and serious felonies, violates the Eighth Amendment's prohibition against cruel and unusual punishments.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a sentence of 25 years to life imprisonment under a state three-strikes law for a conviction for grand theft violates the Eighth Amendment's prohibition against cruel and unusual punishments. A number of federal criminal statutes impose lengthy terms of imprisonment, including imprisonment for life, for recidivist offenses. See, *e.g.*, 18 U.S.C. 3559(c) (providing for mandatory sentence of life without parole for the commission of a "serious violent felony" after separate convictions for two or more "serious violent felonies," or for one or more "serious violent felonies" and one or more "serious drug offenses"); 21 U.S.C. 841(b) (prescribing sentence of mandatory life without parole for drug trafficking offenses if defendant has two prior felony drug convictions); 28 U.S.C. 994(h) (requiring the Sentencing Commission to provide for a sentence at or near the statutory maximum if the defendant is convicted of a felony that is a crime of violence or drug trafficking offense and has prior convictions for two or more such felonies); Sentencing Guidelines § 4B1.1 (career offender sentencing guideline). The United States has a

substantial interest in the constitutionality of lengthy sentences imposed for recidivism.

STATEMENT

1. California's Three Strikes Law was enacted in nearly identical form both by the California legislature (Cal. Penal Code § 667(e) (West 1999)) and by ballot initiative (*id.* § 1170.12(c) (Supp. 2002)) with the support of nearly 72% of the popular vote. In enacting the law, the legislature "acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes," and that "those goals [are] best achieved by ensuring 'longer prison sentences and greater punishment' for second and third 'strikers.'" *People* v. *Cooper*, 51 Cal. Rptr. 2d 106, 111 (Ct. App. 1996). The purpose of the law is "to deter offenders * * * who repeatedly commit * * * crimes and to segregate them from the rest of society." *People* v. *Ayon*, 53 Cal. Rptr. 2d 853, 862 (Ct. App. 1996).

Under the statute, when a defendant with one prior conviction for a "serious" or "violent" felony (a "strike") is convicted of any felony, he must be sentenced to a term of imprisonment twice as long as he otherwise would have received. See Cal. Penal Code § 667(d)(1) and (e)(1) (West 1999); *id.* § 1170.12(b)(1) and (c)(1) (Supp. 2002). When a defendant with two prior "strikes" is convicted of any felony, he ordinarily must receive an indeterminate prison term of 25 years to life—that is, he becomes eligible for parole after 25 years.[1] See *id.* § 667(d)(1) and (e)(2)(A) (1999); *id.* § 1170.12(b)(1) and (c)(2)(A) (Supp. 2002). "Serious" and "violent" felonies are specified by statute, and typically are grave offenses that involve violence or the threat or serious risk of violence. See *id.* § 667.5 (1999 & Supp. 2002) (defining "violent felonies"); *id.* § 1192.7 (1982 & Supp. 2002) (defining "serious felonies"). The "triggering" offense, though it must be a felony, need be neither "serious" nor "violent." Prior offenses must be alleged in the charging document, and the defendant has a right to a jury trial on whether the prior strikes have been proved beyond a reasonable doubt. *Id.* § 1025 (1985 & Supp. 2002); *id.* § 1158 (1985).

Under California law, certain offenses may be either misdemeanors or felonies. There are two basic types of felony-misdemeanor (or "wobbler") offenses. Some crimes that would otherwise be misdemeanors become "wobblers" because of the defendant's prior criminal record. See, *e.g.*, Cal. Penal Code § 490 (West 1999); *id.* § 666 (1999 & Supp. 2002) (petty theft, a misdemeanor, becomes a felony-misdemeanor where the defendant has previously served a term of imprisonment for specified theft-related crimes). Others, such as grand theft, are felony-misdemeanors regardless of the defendant's prior record. See *id.* § 489(b) (1999). Both types of "wobblers" qualify as triggering offenses under the Three Strikes Law when they are felonies.[2]

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[1] The statute provides that:

> the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of
>
> (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or
>
> (ii) twenty-five years or
>
> (iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

Cal. Penal Code § 667(e)(2)(A) (West 1999); *id.* § 1170.12(c)(2)(A) (Supp. 2002).

[2] California law defines non-capital felonies by the place the sentence will be served, rather than by the length of incarceration: "A felony is a crime which is punishable with death or by imprisonment in the state prison." Cal. Penal Code § 17(a) (West 1999). Misdemeanors are punished "by fine or imprisonment in the county jail." *Id.* § 17(b). By statute,

Trial courts have "broad discretion" (*People* v. *Superior Court (Alvarez)*, 928 P.2d 1171, 1176 (Cal. 1997)) to reduce a "wobbler" charged as a felony to a misdemeanor before preliminary examination (Cal. Penal Code § 17(b)(5) (West 1999)) or at sentencing (*id.* § 17(b)(1)) and may thereby avoid imposition of a Three Strikes sentence. In exercising that discretion, "the court should examine the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior" as well as other "general objectives of sentencing," *Alvarez*, 928 P.2d at 1177-1178, and it should not act solely because of "an aversion to [the Three Strikes] statutory scheme." *Id.* at 1178 (internal quotation marks omitted). Appellate courts review decisions to reduce a wobbler to a misdemeanor under an "extremely deferential and restrained standard." *Id.* at 1179.

California law also gives trial courts "broad" authority, on motion of the prosecution or sua sponte, to strike prior offense allegations "in furtherance of justice." *People* v. *Superior Court (Romero)*, 917 P.2d 628, 647-648 (Cal. 1996). See generally Cal. Penal Code § 667(f)(2) (West 1999); *id.* § 1170.12(d)(2) (Supp. 2002); *id.* § 1385 (2000 & Supp. 2002). By reducing wobblers predicated on prior offenses to misdemeanors (which do not qualify as triggering offenses), or by striking prior serious or violent felonies, courts may avoid imposing a Third Strike sentence. In doing so, courts must determine that, "in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes sentencing] scheme's spirit, in whole or in part." *People* v. *Williams*, 948 P.2d 429,

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felonies are punishable by a year or more of imprisonment, and misdemeanors by a year or less. See *id.* §§ 18, 19.2.

437 (Cal. 1998). Decisions to strike are given "deferential" review on appeal. *Id.* at 438.

Although wobblers can be either felonies or misdemeanors, they are presumptively felonies and are "regarded as a felony for every purpose" (1 B.E. Witkin & N. Epstein, *California Criminal Law* § 73, at 119 (3d ed. 2000)), and "remain[] a felony except when the [court's] discretion is actually exercised" to make the crime a misdemeanor. *People* v. *Williams*, 163 P.2d 692, 696 (Cal. 1945) (internal quotation marks omitted).

2. On March 12, 2000, petitioner walked out of a shop in El Segundo, California, with three golf clubs concealed in his trouser leg. He did not pay for the clubs, which were priced at $399 each. An employee of the shop observed the theft and contacted the police, who arrested petitioner in the parking lot.

Petitioner has a lengthy criminal record dating back to 1984. His prior convictions are as follows:

DATE	OFFENSE(S)	SENTENCE
11-12-1984	(Ohio) grand theft	3 years' probation, jail suspended, $300 fine
9-9-1988	grand theft auto[3]	3 years' probation, 1 year in county jail
2-25-1990	petty theft with a prior	3 years' probation, 60 days in county jail
7-10-1992	battery	2 years' summary probation, 30 days in county jail
8-13-1992	theft	12 months' probation, 10 days in county jail

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[3] Ewing was convicted of felony grand theft auto, but after he completed probation, the sentencing judge reduced the crime to a misdemeanor. See Cal. Penal Code § 17(b)(3) (West 1999). Acting pursuant to Penal Code § 1203.4 (1982 & Supp. 2002), the judge then allowed petitioner to withdraw his guilty plea and dismissed the case. Under Section 1203.4(a), that case is still considered a conviction for purposes of prior-conviction allegations in later prosecutions.

1-9-1993	burglary	1 year's summary probation, 60 days in county jail
2-24-1993	possession of drug paraphernalia	3 years' probation, 6 months in county jail
7-29-1993	appropriation of lost property	2 years' summary probation, 10 days in county jail
9-10-1993	possession of a firearm; trespassing	1 year's probation, 30 days in county jail
12-9-1993	robbery and 3 counts of burglary	9 years & 8 months in state prison

The record before the trial court indicated that the robbery and three burglaries that gave rise to petitioner's most recent prior convictions were committed at a Long Beach apartment complex over a five-week period. During the robbery/burglary, petitioner approached an individual at the complex and, claiming he had a gun, told the victim to turn over his wallet. When the victim resisted, petitioner pulled a knife and forced the victim to take petitioner to his apartment, which he then burgled. The other two burglaries involved petitioner's surreptitious entry into other apartments in the complex, one of which was occupied at the time of his crime. During the burglaries, petitioner stole cash, jewelry, electronic equipment, a firearm, a stun gun, and a passport. When petitioner was arrested in a common area of the complex 11 days after the robbery, he was carrying the knife used during that crime. See Br. of California at 2-4, *People* v. *Ewing*, No. B083830 (Cal. Ct. App. 1994).

3. Based on petitioner's theft of the golf clubs, the District Attorney for the County of Los Angeles filed an information charging him with one count of grand theft[4] and one count of burglary. The information alleged that petitioner had incurred four prior "strikes" within the meaning of the three strikes law, consisting of petitioner's December 1993 robbery and burglary convictions.

After a jury trial, petitioner was convicted of grand theft and acquitted of burglary. Because petitioner had waived his right to a jury determination on prior offenses, the trial court acted as finder of fact and found the prior conviction allegations true. The court denied petitioner's motions to reduce the grand theft charge to a misdemeanor and to strike two of the prior felony convictions alleged in the information, concluding that petitioner's record of "consistent criminal activity" brought him within "the intent of the three strikes law." J.A. 14. The court did, however, strike the prior offense for purposes of a separate sentence enhancement for prior prison terms. J.A. 14-15. See generally Cal. Penal Code § 667.5 (West 1999 & Supp. 2002). Petitioner was sentenced to a term of imprisonment for 25 years to life.

4. The Court of Appeal of California affirmed. Pet. App. 23-31. The court rejected petitioner's claim that the trial court erred in declining to reduce his grand theft conviction to a misdemeanor, noting that, while the current offense was not violent, petitioner "had been convicted of nine offenses * * * in a five-year period from 1988 through 1993 and committed the current theft while on parole less than a year after being released from prison." *Id.* at 26-27. The court also rejected petitioner's claim that the trial court erred by refusing to strike one or more of his prior violent or serious convictions, noting the fact that "[t]wo of his prior strike convictions were violent and involved the use of a weapon,"

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[4] California law defines grand theft as the theft of money or property with a value exceeding $400. Cal. Penal Code § 487 (West 1999). The penalty for the felony offense is presumptively two years, unless there are circumstances in mitigation (in which case the sentence is 16 months) or aggravation (three years). See *id.* § 1170(b) (1985 & Supp. 2002).

the "bleak[ness]" of his "rehabilitative prospects," and the fact that defendant had continued to reoffend even though he had been on parole or probation continuously since 1988. In light of those factors, the court concluded that petitioner "was within the spirit of the Three Strikes law." *Id.* at 28.

The court also rejected petitioner's claim that his sentence was grossly disproportionate under the Eighth Amendment. The court observed that in *Rummel* v. *Estelle*, 445 U.S. 263 (1980), this Court upheld a mandatory life sentence under a Texas recidivist statute for a defendant convicted of obtaining $120.75 by false pretenses, where the defendant had two prior felony convictions for "nonviolent petty thefts." Pet. App. 29. The court noted that *Rummel* made clear that enhanced sentences under recidivist statutes serve the "legitimate goal" of deterring and segregating repeat offenders. *Ibid.* The California Supreme Court denied petitioner's petition for review.

SUMMARY OF ARGUMENT

To effectuate the settled principle that Eighth Amendment judgments should be based on objective factors, courts should be especially reluctant to hold unconstitutional legislatively mandated sentences for felonies that fall short of two types of punishment this Court has held are different in kind from all others: the death penalty and life imprisonment without parole. This Court's decisions reflect a recognition that, aside from the death penalty and other punishments different in kind from fine or imprisonment, there is little objective basis for distinguishing between sentences of different lengths.

I. Petitioner's sentence of imprisonment for 25 years to life for grand theft under California's Three Strikes Law does not violate this Court's narrow principle prohibiting grossly disproportionate sentences. Petitioner's enhanced penalty reflects the State's legitimate interest in imposing more severe penalties on persons whose record of convictions demonstrates an inability to comply with the law. That interest is particularly compelling because of petitioner's record of violent crime. Petitioner's triggering offense of grand theft and his past convictions for armed robbery and residential burglary are more serious, and the penalty imposed not materially more severe, than was the case in *Rummel* v. *Estelle*, 445 U.S. 263 (1980). There, the Court upheld against an Eighth Amendment challenge a comparable life sentence imposed under a recidivist statute on a defendant convicted of obtaining $120.75 by false pretenses. And petitioner's triggering offense and prior crimes are more serious than in *Solem* v. *Helm*, 463 U.S. 277 (1983), where the Court invalidated a life sentence that, unlike the one here, afforded no possibility of parole.

The principle that courts should give substantial deference to legislatures to specify the classification and punishment of crimes applies with particular force where, as here, the legislature—rather than an individual judge—has itself determined the specific punishment for an offense. Although California law allows judges to sentence grand theft as a misdemeanor in the interests of rehabilitating deserving defendants, California courts have consistently held that the availability of that option does not detract from the crime's status as a presumptive felony and a serious offense. That the Three Strikes Law could conceivably be applied in an unduly broad manner to defendants with insignificant criminal records is not relevant in assessing the proportionality of its application here, in light of petitioner's long and continuous record of criminal offenses, including crimes of violence. In addition, California courts have broad discretion to avoid disproportionally harsh applications of the law.

II. No comparative analysis of sentences prescribed for other crimes in California and for the same crime in other jurisdictions is necessary because petitioner's case does not warrant an initial judgment that his sentence is grossly disproportionate to the crime. But in any event, compara-

tive analysis does not undermine the conclusion that petitioner's sentence is constitutional. Petitioner's comparison of his sentence to crimes he characterizes as "more serious" is based on the erroneous premise that penal codes must assign central importance to retribution. The Eighth Amendment permits California's decision to impose relatively lighter penalties on first offenders to promote rehabilitation, while imposing heavier penalties on habitual offenders, where interests in deterrence and incapacitation outweigh rehabilitation. Nor does interjurisdictional comparison support the suggestion that petitioner's punishment is grossly disproportionate to his offense. At least eight States authorize life sentences for habitual offenders convicted of theft, and several States have imposed such sentences on habitual offenders with criminal records comparable to petitioner's.

ARGUMENT

THE THREE STRIKES SENTENCE IN THIS CASE DOES NOT VIOLATE THE EIGHTH AMENDMENT

This Court has often observed that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Rummel* v. *Estelle*, 445 U.S. 263, 274-275 (1980) (quoting *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)); accord *Solem* v. *Helm*, 463 U.S. 277, 290 (1983) ("courts should be guided by objective factors" in conducting proportionality review). "The most prominent objective factor" guiding the Court in assessing disproportionality claims "is the type of punishment imposed." *Harmelin* v. *Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

This Court's disproportionality decisions reflect a judgment that courts are better equipped to distinguish between types of punishment than degrees of punishment. This

Court has "draw[n] a 'bright line' between the punishment of death and * * * punishments short of that ultimate sanction" in holding that capital punishment is disproportionate to the crime of raping an adult woman. *Rummel*, 445 U.S. at 275 (citing *Coker*). In *Weems* v. *United States*, 217 U.S. 349 (1910), the Court "could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system." *Rummel*, 445 U.S. at 275. The Court has also distinguished sentences of life imprisonment imposed for recidivist property crimes when the defendant was eligible for parole from life sentences when he was not. See *Solem*, 463 U.S. at 297 (distinguishing *Rummel*). But once the barrier of parole eligibility is passed, the Court's decisions reflect a "relative lack of objective standards concerning terms of imprisonment," *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment); see *Solem*, 463 U.S. at 295; *Rummel*, 445 U.S. at 275.

In light of the lack of clear objective standards in this area, it is especially difficult to hold unconstitutional legislatively mandated felony sentences that fall short of two types of punishment that this Court has noted are different in kind from all others: the death penalty and—to a far lesser extent—life imprisonment without parole. See *Rummel*, 445 U.S. at 272 ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. * * * It is unique in its rejection of rehabilitation.") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); *Solem*, 463 U.S. at 297 (noting that "[o]nly capital punishment" is more severe than life imprisonment without parole); *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (likening sentence of life without parole to death penalty because "[t]he offender will never regain his freedom," and accordingly "the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution

wholly outweighs any considerations of reform or rehabilitation of the perpetrator'") (quoting *Furman*, 408 U.S. at 307 (Stewart, J., concurring)). Proportionality challenges to felony sentences short of life imprisonment without parole should be successful only under the most exceptional circumstances. See, *e.g.*, *Robinson* v. *California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Rummel*, 445 U.S. at 274 n.11 (suggesting proportionality principle might be implicated "if a legislature made overtime parking a felony punishable by life imprisonment"). As the Court noted in *Rummel*, "[o]nce the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving 'violence' violates the cruel-and-unusual punishment prohibition of the Eighth Amendment." 445 U.S. at 283 n.27.[5] That principle is applicable

[5] Indeed, the Fourth and Sixth Circuits have held that proportionality review is limited to cases involving sentences of death or life without parole, and other courts of appeals have suggested that result. See *United States* v. *Cheek*, 65 F.3d 60, 63 (6th Cir. 1995) ("This Court will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole.") (internal quotation marks omitted); *United States* v. *Lockhart*, 58 F.3d 86, 89 (4th Cir. 1995); see also *United States* v. *Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990) ("because Meirovitz was sentenced to life without parole, we will engage in the rare review of the constitutionality of a district court sentence"), cert. denied, 502 U.S. 829 (1991). But see *Hawkins* v. *Hargett*, 200 F.3d 1279, 1284 (10th Cir. 1999) ("While we recognize that the availability of parole is a relevant consideration, we are not willing to make it dispositive."), cert. denied, 531 U.S. 830 (2000). While that position is in tension with statements in some of this Court's opinions that "no penalty is *per se* constitutional," *Solem*, 463 U.S. at 290; *Robinson*, 370 U.S. at 667, it reflects an appreciation of the profound difficulty of drawing "any constitutional distinction between one term of years and a shorter or longer term of years." *Rummel*, 445 U.S. at 275.

here, where petitioner's sentence, though serious, affords him the opportunity for parole after 25 years.

I. PETITIONER'S SENTENCE OF IMPRISONMENT FOR 25 YEARS TO LIFE IS NOT GROSSLY DISPROPORTIONATE TO THE CRIME OF GRAND THEFT BY AN HABITUAL OFFENDER

This Court's decisions make clear that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Rather, the "narrow proportionality principle" (*id.* at 996) recognized in this Court's Eighth Amendment jurisprudence forbids only sentences that are "grossly disproportionate" to the crime. *Solem*, 463 U.S. at 288, 303; *Rummel*, 445 U.S. at 271; *Weems*, 217 U.S. at 371. Petitioner claims that his sentence of imprisonment for 25 years to life for "shoplifting three golf clubs" (Pet. Br. 24) presents an "extreme circumstance" (*Harmelin*, 501 U.S. at 1006-1007 (Kennedy, J., concurring in part and concurring in the judgment)) that warrants invalidating a penalty specifically prescribed both by the California legislature and an overwhelming majority of California voters. Petitioner's sentence, evaluated in light of his criminal record, is within constitutionally permissible limits.

A. Petitioner's Sentence Is Within The Constitutional Limits Described By This Court's Eighth Amendment Decisions

1. Petitioner's claim that his sentence of imprisonment for 25 years to life is unconstitutionally disproportionate for the offense of "shoplifting three golf clubs" (see, *e.g.*, Pet. Br. i, 2, 15, 23, 24, 27; Brief of Amicus Families Against Mandatory Minimums (FAMM Br.) 2, 6) incorrectly frames the issue. Petitioner did not receive that sentence simply because he was convicted of grand theft. Rather, petitioner was sentenced under the Three Strikes Law because he was

convicted of grand theft after previously having been convicted of at least two "violent" or "serious" felonies. Petitioner's mandatory penalty is "based not merely on [his] most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Rummel*, 445 U.S. at 284; accord *Solem*, 463 U.S. at 296. As this Court has recognized, the interest of a State in enacting a recidivist-enhancement statute is not merely that of punishing the offense of conviction; "it is in addition the interest * * * in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." 445 U.S. at 276; accord *Solem*, 463 U.S. at 296.

There is no merit to the suggestion (Pet. Br. 11; FAMM Br. 6, 8) that the Double Jeopardy Clause prohibits imposing an enhanced sentence on a person convicted of a nonviolent offense who has prior convictions for crimes of violence. A State has a valid interest in imposing more severe punishment on a recidivist who has previously been convicted of violent crimes even if his triggering offense does not involve violence, in recognition of the fact that he presents a greater danger to society than persons convicted of the same triggering offense with no history of violence. That is the same basic rationale that has traditionally supported habitual-offender sentencing, which has never been thought to raise double-jeopardy concerns. *Parke* v. *Raley*, 506 U.S. 20, 27 (1992) (collecting authorities). Although, as petitioner observes (Pet. Br. 11), the focus of disproportionality analysis is the triggering offense, the Court explicitly has "recognize[d] * * * that [a defendant's] prior convictions are relevant" to determining the proportionality of a sentence. *Solem*, 463 U.S. at 296 n.21. Indeed, *Solem* indicates that the presence or absence of violent prior crimes is a factor in determining the appropriateness of lengthy imprisonment. *Id.* at 297 & n.22; *id.* at 299 n.26.

2. This Court's resolution of past disproportionality claims indicates that petitioner's sentence is constitutional. In *Rummel* v. *Estelle*, *supra*, the Court upheld against an Eighth Amendment challenge a mandatory sentence of life imprisonment (with possibility of parole) imposed under a recidivist statute on a defendant convicted of obtaining $120.75 by false pretenses, who had prior convictions for fraudulently using a credit card to obtain $80 worth of goods and services and for passing a forged check in the amount of $28.36. Petitioner's prior crimes and triggering offense are more serious than the conduct at issue in *Rummel*. Petitioner's current offense, involving the theft of almost $1200 in merchandise, is more serious than Rummel's in both actual and inflation-adjusted dollars. Petitioner's prior serious or violent offenses, which include armed robbery and three residential burglaries (two with the victim present), indisputably are more serious than Rummel's nonviolent fraud and bad-check charges. See generally *McGruder* v. *Puckett*, 954 F.2d 313, 317 (5th Cir.) (armed robbery "certainly endangers life, limb, and property as much as any non-capital offense"), cert. denied, 506 U.S. 849 (1992). In addition, petitioner has been convicted on nine other occasions of numerous misdemeanor and felony offenses (some involving violence), served nine separate terms of incarceration, and committed the vast majority of his crimes —including the triggering grand theft offense—while on probation or parole.[6]

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[6] Because a defendant's entire criminal record (not just his qualifying "strikes") is relevant to his ability to "conform[] to the norms of society" (*Rummel*, 445 U.S. at 276), it may properly be considered in conducting proportionality review of recidivist sentences. Cf. *Solem*, 463 U.S. at 279-280, 296-297, 299 (considering Helm's six prior convictions, although the recidivist statute at issue required only three for eligibility). The California courts routinely consider prior convictions not alleged as "strikes" in resolving proportionality challenges under the federal and state constitutions. See, *e.g.*, *People* v. *Cuevas*, 107 Cal. Rptr. 2d 529, 540 (Ct. App. 2001); *People* v. *Cortez*, 86 Cal. Rptr. 2d 234, 240-241 (Ct. App. 1999).

As the court of appeals correctly concluded (Pet. App. 29), "by analogy" to *Rummel*, petitioner's sentence did not violate the Eighth Amendment. Petitioner's long criminal history, his demonstrated willingness to engage in violence, and his prompt return to crime after his release from prison, reflect an inability to conform his behavior to law despite having "been both graphically informed of the consequences of lawlessness and given an opportunity to reform." *Rummel*, 445 U.S. at 278. When a person has shown through a long history of criminal behavior an inability to abide by law, the Constitution does not require a State to protect itself by imprisoning him "on the installment plan" for a succession of relatively short sentences. Rather, the State is "entitled to place upon [the defendant] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State" (*id.* at 284), and to "segregate [him] from the rest of society for an extended period of time" until he has shown himself ready to rejoin it. *Ibid.* Cf. *Graham* v. *West Virginia*, 224 U.S. 616 (1912) (upholding against Eighth Amendment challenge life sentence for third conviction for horse theft).

Contrary to the claims of petitioner and his amicus (Pet. Br. 28; FAMM Br. 19), *Rummel* is not distinguishable on the grounds that the defendant in that case was eligible for parole in 12 years instead of 25, or because of the specific parole policies employed by Texas or California. *Rummel* did not turn on the specific length of time before parole eligibility, but on the simple fact that the crime was parole eligible. The Court observed that the mere "possibility of parole, however slim, serves to distinguish [a parole-eligible defendant] from a person sentenced under a recidivist statute * * * which provides for a sentence of life without parole." 445 U.S. at 281. In any event, differences between parole eligibility dates of this magnitude are not constitutionally significant. As the Court noted in *Solem*, "[i]t is clear that a 25-year sentence generally is more severe than a

15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." 463 U.S. at 294; *Rummel*, 445 U.S. at 275 (noting difficulty of drawing "any constitutional distinction between" sentences for terms of years).

Solem v. *Helm*, *supra*, provides no support for holding petitioner's sentence unconstitutionally disproportionate; rather, the differences between the two cases underscore the proportionality of petitioner's sentence. There, Helm was sentenced to life imprisonment without possibility of parole under a South Dakota recidivist statute for uttering a "no account" check for $100. His prior convictions included three burglaries, obtaining money under false pretenses, and grand larceny. In finding the sentence unconstitutional, the Court stressed that Helm's "relatively minor" crimes "involved neither violence nor threat of violence to any person" (463 U.S. at 296-297), and observed that uttering a "no account" check was "one of the most passive felonies a person could commit."[7] *Id.* at 296. This case differs significantly from *Solem* in both the severity of the sentence and the gravity of the offense. The *Solem* Court twice noted the lack of parole availability in distinguishing *Rummel* (*id.* at 297, 303 n.32), emphasizing that life imprisonment without parole is "far more severe than [a] life sentence" with possibility of parole. *Id.* at 297. In contrast to the "passive" triggering offense in *Solem* (*id.* at 296), petitioner's triggering offense presented a risk of violent confrontation because it was

[7] While Helm's prior convictions included three burglaries, since deciding *Solem*, this Court has recognized that burglary presents an "inherent potential for harm to persons" by "creat[ing] the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Taylor* v. *United States*, 495 U.S. 575, 588 (1990). California law has long recognized "the dangers to personal safety created by" burglary. *People* v. *Gauze*, 542 P.2d 1365, 1368 (Cal. 1975). Petitioner's theft of a gun from an occupied apartment (Br. of California at 2, *People* v. *Ewing*, *supra*) starkly presents the risk of violence inherent in burglary.

committed in the presence of the victim.[8] Petitioner's prior criminal record is both longer than Helm's and involves graver offenses, including crimes of violence. Cf. *id.* at 297 n.22.

B. Mandatory Penalties Set By Legislatures Are Entitled To Particular Deference

Solem is distinguishable from this case in another critical respect. The sentence of life imprisonment at issue in that case was not mandatory, but rather represented a statutory maximum term that had been imposed at the discretion of the sentencing judge. Thus, the Court emphasized, its determination that the sentence was disproportional did "not question the legislature's judgment" about the appropriateness of the penalty. *Solem*, 463 U.S. at 299 n.26. Compare *Rummel*, 445 U.S. at 266 (involving mandatory sentence). Here, by contrast, both California's legislature and an overwhelming majority of its voters have made a judgment that persons who commit any felony who have two previous convictions for serious or violent felonies should receive a sentence of 25 years to life. Under such circumstances, "[t]o set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the [California] Legislature and * * * the [California] citizenry."[9] *Harmelin*, 501

[8] Petitioner and his amicus err in suggesting that his "property crime" did not "create the risk of * * * bodily injury to any person." Pet. Br. 24; FAMM Br. 10, 11 n.8. As with burglary, theft poses a risk of confrontation and injury during commission of the offense or attempt to escape. Many courts have observed that "[s]o-called 'property crimes,' such as shoplifting, may turn violent if a chase ensues." *Galloway* v. *Bankers Trust Co.*, 420 N.W.2d 437, 439 (Iowa 1988) (quoting *Jardel Co.* v. *Hughes*, 523 A.2d 518, 525 (Del. 1987)); accord *Hopkinson* v. *Chicago Transit Auth.*, 570 N.E.2d 716, 729 (Ill. App. Ct. 1991).

[9] It is clear that voters were made aware that persons who had committed nonviolent felonies would be subject to the enhanced sentence. See, *e.g.*, Prop. 184 Increased Sentences Repeat Offenders Initiative Statute Voter Pamphlet, *Analysis by the Legislative Analyst*, General

U.S. at 1006 (Kennedy, J., concurring in part and concurring in the judgment).

Invalidating petitioner's sentence therefore would represent a stark challenge to "[t]he first of th[e] principles" that "give content to the uses and limits of proportionality review," *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment), the principle "that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Ibid.* (quoting *Rummel*, 445 U.S. at 275-276). This Court has emphasized the respect due to legislatures in classifying criminal behavior and determining to what extent the goals of retribution, deterrence, incapacitation, and rehabilitation ought to be served in meting out punishments. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, * * * these are peculiarly questions of legislative policy."); accord *Solem*, 463 U.S. at 290; *Rummel*, 445 U.S. at 274. Accordingly, this Court "ha[s] never invalidated a penalty mandated by a legislature based only on the length of sentence, and * * * should do so only in the most extreme circumstance." *Harmelin*, 501 U.S. at 1006-1007 (Kennedy, J., concurring in part and concurring in the judgment).

C. The Alleged Overbreadth Of The Three Strikes Law Does Not Render Petitioner's Sentence Unconstitutional

Petitioner and his amicus argue that certain features of the California Three Strikes Law render its application un-

Election (Nov. 8, 1994), at 33 (noting the mandatory sentence would apply "for *any new* felony conviction (not just * * * serious or violent felon[ies]"); *id.* at 36 (Rebuttal to Argument in Favor of Proposition 184) ("PROPOSITION 184 LUMPS IN NONVIOLENT OFFENDERS WITH VIOLENT CRIMINALS").

constitutional. First, they argue that grand theft's classification as a felony-misdemeanor or "wobbler" reflects a legislative "judgment that * * * [it] is among the least serious [crimes] in the state" (Pet. Br. 25; see FAMM Br. 10), and insufficiently serious to authorize a three-strikes penalty of imprisonment for 25 years to life. Second, they argue that the Three Strikes sentencing scheme is unduly expansive, in that a defendant needs not have served a prior term of imprisonment; prior convictions need not be violent so long as they are "serious"; and there is no "washout" period for old strikes. Pet. Br. 21-22; see FAMM Br. 3, 9 n.6, 15-23.

1. Petitioner's argument fundamentally misconceives the nature of felony-misdemeanor offenses under California law. The California Supreme Court itself has noted the "seriousness]" of grand theft in the context of proportionality review. *In re Lynch*, 503 P.2d 921, 936 n.20 (Cal. 1972) (striking down sentence of life imprisonment for recidivist indecent exposure as disproportionate under state constitution; noting excessiveness of sentence in relation to "serious" crimes such as felony-misdemeanors forgery and grand theft). In addition, theft of $1200 in property is a felony under federal law, 18 U.S.C. 641, and in the vast majority of States. See Pet. Br. App. 2, at XXIX. While courts have discretion to reduce a felony grand theft charge to a misdemeanor after the preliminary hearing or at sentencing (see Cal. Penal Code §§ 17(a) and (b)(4)), 489(b) (West 1999)), it remains "a felony for all purposes" (*People* v. *Superior Court (Perez)*, 45 Cal. Rptr. 2d 107, 114 (Ct. App. 1995)), "unless and until the trial court imposes a misdemeanor sentence." *In re Anderson*, 447 P.2d 117, 152 (Cal. 1968) (Tobriner, J., concurring), cert. denied, 406 U.S. 971 (1972); see generally 1 B.E. Witkin & N. Epstein, *California Criminal Law* § 73, at 119 (3d ed. 2000).

Grand theft should not be treated as a trivial offense simply because the California legislature has authorized the crime to be charged and sentenced as a misdemeanor. "The

fact that [a] crime may also be punished by confinement in local custody for up to one year does not detract from its felony status." *People* v. *Haywood*, 54 Cal. Rptr. 2d 120, 123 (Ct. App. 1996) (internal quotation marks omitted). California law classifies many unquestionably grave crimes as "wobblers," such as assault with a deadly weapon, including certain firearms (Cal. Penal Code § 245 (West 1999 & Supp. 2002)), assaulting a judge or juror of a local, state, or federal court in retaliation for or to prevent the performance of the victim's official duties (*id.* § 217.1), assaulting a prison guard (*id.* § 241.1 (1999)), witness intimidation (*id.* § 136.1 (1999)), taking a bribe to conceal a crime (*id.* § 153 (1999)), and money laundering of up to $25,000 per month with intent to promote criminal activity. *Id.* § 186.10(a) (1999).

"The purpose of the trial judge's sentencing discretion" to downgrade certain felonies "is to impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon." *Anderson*, 447 P.2d at 152 (Tobriner, J., concurring); accord *People* v. *Bowden*, 150 Cal. Rptr. 633, 636 (App. Dep't Super. Ct. 1978) (to permit "more lenient treatment [for] an offender" in deserving cases). The reduction is not based on the "erroneous[] grounds that the offense is conceptually a misdemeanor but it is rather intended to extend misdemeanant treatment to a potential felon." *Necochea* v. *Superior Court*, 100 Cal. Rptr. 693, 695 (Ct. App. 1972). The crime is not tantamount to a misdemeanor in seriousness. *People* v. *Statum*, No. S097715 (Cal. July 25, 2002), slip op. 6 ("Our case law has consistently treated the misdemeanor as a lesser offense than the felony wobbler."); *Burris* v. *Superior Court*, 119 Cal. Rptr. 2d 221, 228 (Ct. App. 2002) ("[i]f the offense is potentially a felony, society has a much greater interest in its punishment" than if it is a straight misdemeanor) (internal quotation marks omitted). And California courts have long held that while treating the

crime as a misdemeanor may change its name, "the nature of the crime is not changed." *Doble* v. *Superior Court*, 241 P. 852, 859 (Cal. 1925); *In re Rogers*, 66 P.2d 1237, 1238 (Cal. Ct. App. 1937) ("the character of the offense is not changed from a felony to a misdemeanor by the mere imposition of a fine or jail sentence").

Many jurisdictions have enacted misdemeanors that closely correspond to felonies, and persons charged with felonies often have their charges resolved as misdemeanors when mitigating circumstances are present. In those jurisdictions, the existence of closely related misdemeanor charges has never been thought to undermine the seriousness of felony charges when they are brought. The outcome should be no different here simply because the California legislature essentially has combined the two in a single provision. Cf. *Davis* v. *Municipal Court*, 757 P.2d 11, 21 (Cal. 1988) (likening decision to charge wobbler as misdemeanor or felony to ordinary decision "to charge either a felony or misdemeanor").

2. The features that petitioner claims render the Three Strikes scheme unduly broad (Pet. Br. 21-22) are not implicated in his case. Although petitioner's prior "strikes" were incurred in a single proceeding, the concern that makes that factor relevant to the proportionality inquiry—that defendants should be given opportunities to reform themselves before incurring a life sentence (see *Rummel*, 445 U.S. at 278)—is satisfied here. Petitioner has served nine terms of incarceration for prior offenses. Petitioner has been convicted of crimes of violence, and his prior convictions are not unduly old—indeed, he was released from jail on his "strike" offenses just nine months before his current crime.

California law addresses each of the concerns raised by petitioner by "provid[ing] trial courts * * * substantial discretion to ensure that the three-strikes sentence fits" the crime (*People* v. *Romero*, No. E030010, 2002 WL 1481257, at *6 (Cal. Ct. App. July 11, 2002)), by sentencing wobblers as

misdemeanors and striking prior convictions for sentencing purposes. See generally *People* v. *Garcia*, 976 P.2d 831, 837 (Cal. 1999) ("the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences"). In exercising their "abundant discretion" (*People* v. *Trausch*, 42 Cal. Rptr. 2d 836, 841 (Ct. App. 1995)), courts routinely consider the age of prior convictions (*People* v. *Superior Court (Alvarez)*, 928 P.2d 1171, 1179 (Cal. 1997); *People* v. *Vessell*, 42 Cal. Rptr. 2d 241, 248 (Ct. App. 1995)), whether prior offenses were violent (*Alvarez*, 928 P.2d at 1179; *People* v. *Williams*, 948 P.2d 429, 438-439 (Cal. 1998)), whether prior convictions "arose from a single period of aberrant behavior for which [the defendant] served a single prison term" (*Garcia*, 976 P.2d at 839), whether the current offense reflected reduced culpability (*People* v. *Crossdale*, 39 P.3d 1115, 1117 (Cal. 2002)), and even whether the current offense is minor (*People* v. *Bishop*, 66 Cal. Rptr. 2d 347 (Ct. App. 1997) (affirming decision to strike "where present crime is a petty theft and prior violent offenses [are] remote")). Thus, contrary to claims of petitioner's amicus (FAMM Br. 23; *id.* at 20-23), a "disproportionately harsh sentence is * * * subject to judicial modification" under California law. *People* v. *Mantanez*, 119 Cal. Rptr. 2d 756, 765 (Ct. App. 2002).

II. COMPARATIVE ANALYSIS OF SENTENCES WITHIN AND BETWEEN JURISDICTIONS DOES NOT UNDERMINE THE CONCLUSION THAT PETITIONER'S SENTENCE IS CONSTITUTIONAL

Solem did not create a rigid requirement that sentences within and between jurisdictions must be compared to assess every disproportionality claim. Rather, as petitioner and his amicus recognize (Pet. Br. 17; FAMM Br. 5, 13), *Solem* and this Court's other disproportionality cases are best understood to hold that intrajurisdictional and interjurisdictional

analyses are appropriate only "to validate an initial judgment that a sentence is grossly disproportionate to a crime." See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment). Because petitioner's case does not warrant an "initial judgment that [his] sentence is grossly disproportionate to [his] crime," *ibid.*, consideration of the comparative analyses prepared by petitioner and his amicus is not necessary to reject his claim. In any event, these comparisons only highlight the limitations of such analysis.

A. Petitioner's Comparison Of California Penalties Overlooks The Distinct Penological Purposes Served By Habitual Offender Penalties

Intrajurisdictional comparison is principally useful in reviewing unusual sentences imposed by individual judges from an array of authorized punishments by showing that the sentence departs radically from sentences imposed on similarly-situated defendants in the same jurisdiction. See *Enmund* v. *Florida*, 458 U.S. 782, 795-796 (1982). To draw constitutionally significant conclusions from the comparison of sentences prescribed by the legislature for different crimes within the same jurisdiction is both difficult and runs counter to the principle that the fixing of prison terms for crimes involves judgments that generally are "properly within the province of legislatures, not courts." *Rummel*, 445 U.S. at 275-276. As the Court has recognized, different "crimes * * * implicate other societal interests, making any [intrajurisdictional] comparison inherently speculative." *Id.* at 282 n.27. The severity of the penalty a legislature attaches to a particular crime may be a function not only of the perceived seriousness and moral culpability of the crime—the sole factors petitioner considers relevant to punishment (see Pet. Br. 39-42)—but also of the frequency with which the crime is committed, the ease or difficulty of detection, the degree to which the crime may be deterred by

differing amounts of punishment, the particular penological theory employed by the legislature in that instance, and even budgetary restrictions. See *Harmelin*, 501 U.S. at 988-989 (opinion of Scalia, J.); *id.* at 999 (Kennedy, J., concurring in part and concurring in the judgment).

The limitations of intrajurisdictional comparisons are apparent in petitioner's claim that his punishment is more severe than sentences California prescribes for first- and second-offense crimes he characterizes as more "violent, socially destructive, and/or morally reprehensible." Pet. Br. 39. Petitioner's argument assumes a penal code must assign central importance to retribution. The Eighth Amendment, however, "does not mandate adoption of any one penological theory." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment). The California legislature could rationally conclude that the penological interest in rehabilitation justifies comparatively short sentences for first- and second-time offenders, and indeed, that courts should have discretion to sentence some offenses as misdemeanors. At the same time, the legislature could validly conclude that interests in deterrence and incapacitation warrant comparatively heavy sentences for habitual offenders, even if their triggering offenses alone would be considered less serious if viewed in the abstract. See *Rummel*, 445 U.S. at 283 n.27 ("the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders"). Indeed, the central purpose of the Three Strikes Law was to deter and incapacitate habitual offenders, see *Ayon*, 53 Cal. Rptr. 2d at 861, in light of studies before the legislature indicating that a small number of recidivist offenders were committing a disproportionate share of all crimes.[10] The California legisla-

[10] See *Ways and Means Comm. Analysis*, 1993-1994 Reg. Sess., AB 971, at 2 (Cal. Jan. 13, 1994) (noting proponents' claims that the average

ture and voters could therefore reasonably conclude that a habitual criminal's activity is more "socially destructive" (Pet. Br. 39) than isolated acts of violent crime.[11] *Mantanez*, 119 Cal. Rptr. 2d at 765 ("[r]ecidivism * * * poses a manifest danger to society") (internal quotation marks omitted). Nothing in this Court's Eighth Amendment jurisprudence prohibits that decision.

B. Other States Impose Comparable Penalties For Recidivist Theft

Comparison between jurisdictions suffers from many of the same flaws, as well as an additional one: Because of differences in perspectives and problems from State to State, "[t]he inherent nature of our federal system * * * result[s] in a wide range of constitutional sentences." *Solem*, 463 U.S. at 291 n.17; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment). States

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repeat offender commits 187-278 crimes per year and RAND Corp. analysis indicating that typical repeat offenders commit 15 crimes per year, and that 10% of repeat offenders in a study committed 600 crimes each per year); Prop 184 Increased Sentences Repeat Offenders Initiative Statute Voter Pamphlet, *Analysis by the Legislative Analyst*, General Election (Nov. 8, 1994), at 34 (noting "offenders will serve much longer sentences * * *, thus limiting their ability to commit additional crimes"); see also J. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 McGeorge L. Rev. 1, 9 (2000) (one framer of Three Strikes Law states that law was based on idea that "a relatively small group of people commit a large percentage of all crime").

[11] Petitioner errs in suggesting (Pet. Br. 13, 35, 42) that the Three Strikes Law does not draw distinctions between recidivists based on the gravity of their current offense. The law provides for an alternative minimum term of incarceration of three times the term otherwise specified for the triggering offense, see note 1, *supra*, which would apply instead of the default 25-year term to current felonies having maximum terms of imprisonment greater than eight years and four months. *E.g.*, Cal. Penal Code § 190 (West 1999 & Supp. 2002) (murder); *id.* § 193 (1999) (voluntary manslaughter); *id.* § 213 (1999) (robbery of an inhabited dwelling); id. § 208(b) (1999) (kidnapping person under age of 14); *id.* § 215 (1999) (carjacking); *id.* § 289 (1999) (aggravated sexual assault on a child); *id.* § 451(a) (1999) (arson causing great bodily injury).

must be given broad leeway to punish offenses differently, because "[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991). Tolerance for a variety of approaches is particularly appropriate with respect to recidivism offenses, which involve a number of particularly difficult legislative judgments about the appropriate role of deterrence and rehabilitation, the cost of housing prisoners, which triggering and prior crimes warrant enhanced punishment, "the point at which a recidivist will be deemed to have demonstrated the necessary propensities[,] and the amount of time that the recidivist will be isolated from society." *Rummel*, 445 U.S. at 285. All "are matters largely within the discretion of the punishing jurisdiction." *Ibid.*

Petitioner and his amicus assert that California imposes the harshest penalty of any State for petitioner's criminal conduct. Pet. Br. 43-53; FAMM Br. 13-26. Even if it were true that California alone imposes life imprisonment on habitual offenders with records similar to petitioner's, that fact alone does not suggest gross disproportionality. As the Court has observed, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282.

In any event, a comparison of the sentences prescribed for conduct similar to petitioner's reveals far more widespread application of the punishment than was the case in *Solem*. There, the Court emphasized that "Helm could not have received such a severe sentence in 48 of the 50 states," and there was no indication that a sentence of life without parole had been imposed for similar conduct in the only other State that authorized that sentence. 463 U.S. at 299-300. Taking into account all of petitioner's prior convictions, at least eight States would authorize a life sentence under the circum-

stances of petitioner's case, which hardly suggests such a consensus that "reasonable [persons] cannot differ as to the inappropriateness of a punishment." *Id.* at 311 n.3 (Burger, C.J., dissenting). Alabama mandates a term of life, or a term of imprisonment of not less than 20 years (Ala. Code § 13A-5-9 (1994 & Supp. 2001); *id.* § 13A-8-3 (1994)); Idaho mandates a term of five years to a maximum of life (Idaho Code § 18-2407(b) (1997 & Supp. 2000); *id.* § 19-2514 (1997)); Montana mandates a term of imprisonment from ten to 100 years (Mont. Code Ann. §§ 46-18-501, 46-18-502 (2001)); Nevada mandates life without parole, life with parole eligibility after ten years, or imprisonment for 25 years (Nev. Rev. Stat. Ann. § 207.010 (Michie 2001)); Oklahoma authorizes imprisonment for four years to life (Okla. Stat. Ann. tit. 21, § 51.1 (West 1983 & Supp. 2002)); South Dakota authorizes imprisonment for life (S.D. Codified Laws § 22-1-2 (Michie 1998 & Supp. 2002); *id.* §§ 22-6-1, 22-[illegible]-7, 22-7-8 (1998)); Vermont authorizes imprisonment for life (Vt. Stat. Ann. tit. 13, § 11 (1998)); and West Virginia mandates a term of life imprisonment. W. Va. Code §§ 61-2-13, 61-11-18(c) (2000). At the time of the offense, Louisiana also would have mandated a sentence of life imprisonment. La. Rev. Stat. Ann. § 15:529.1 (West 1992 & Supp. 1999).[12]

Furthermore, it is clear that, unlike in *Solem*, 463 U.S. at 300, life sentences have been imposed in several of these States based on records similar to petitioner's.[13] Thus, an

[12] After petitioner was convicted, Louisiana amended its habitual offender statute, which previously required that either the triggering offense or one of two prior felonies be a qualifying offense, to require that all three be qualifying crimes of violence, sex offenses, drug offenses, or other qualifying offenses. La. Rev. Stat. § 15:529.1 (West 2002). Press accounts suggested that budgetary constraints weighed heavily in the decision. See M. Antrobus, *Bill Reduces Prison Terms: Louisiana Hopes To Save Millions*, Dallas Morning News, June 9, 2001, at 31A ("Proponents estimated the measure could save the state $63 million per year.")

[13] See, *e.g.*, *Ex parte Hourington*, 622 So.2d 896 (Ala. 1993) (affirming life sentence for first-degree theft; prior convictions for grand theft, unauthorized taking, and theft); *Sims* v. *State*, 814 P.2d 63, 64 & n.2 (Nev. 1991) (rejecting disproportionality challenge to sentence of life without parole for grand larceny of $476, where defendant had three prior felonies, including one armed robbery); *State* v. *Heftel*, 513 N.W.2d 397 (S.D. 1994) (sentence of 70 years' imprisonment, with 20 years suspended, for recidivist convicted of theft by deception of $700; prior convictions unspecified). Contrary to the claims of amicus FAMM (FAMM Br. 25), West Virginia courts would be unlikely to find petitioner's sentence disproportionate in light of his recent prior convictions for crimes of violence. See *State* v. *Evans*, 508 S.E.2d 606, 610 (W. Va. 1998) (affirming life sentence imposed on habitual offender for burglary and petit larceny; noting burglary is a crime of violence for proportionality review); accord *State* v. *Housden*, 399 S.E.2d 882, 884-886 (W. Va. 1990).

interjurisdictional comparison of penalties does not suggest that the California legislature and electorate acted unreasonably in selecting penalties.

* * * * *

California's Three Strikes Law reflects that State's effort to deal with the serious problem of crime by recidivists. The State's determination to impose a life sentence with parole eligibility after 25 years on a recidivist grand theft offender does not violate the Eighth Amendment. Evaluated in light of "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors," the sentence in this case cannot be found to be "grossly disproportionate" (*Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)) to petitioner's recidivist offense.

CONCLUSION

The decision of the Court of Appeal of California should be affirmed.

Respectfully submitted.

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JULY 2002

Supreme Court, U.S.
FILED
JUL 1 2002
CLERK

(9)

No. 01-6978

In the Supreme Court of the United States

OCTOBER TERM, 2001

GARY ALBERT EWING,

Petitioner,

-v.-

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan association that conducts research, promotes advocacy, and educates the public about sentencing laws.[1] It was founded in 1991 to challenge inflexible and excessive penalties required by mandatory minimum sentencing. FAMM's 26,000 members include prisoners and their families, attorneys, judges, criminal justice experts, and concerned citizens.

FAMM is a leading voice for sentencing justice and sentencing reform. It conducts workshops for its members, publishes a newsletter, maintains a website, serves as a clearinghouse for the media, researches and places cases for pro bono litigation, litigates individual cases as amicus curiae and counsel of record, and provides input to the U.S. Sentencing Commission on guideline amendments and reform.

FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. FAMM has been particularly concerned with the application of the California Three Strikes statute in cases in which the mandatory sentence of life with parole eligibility only after 25 years is grossly disproportionate to the offense. The application of the mandatory minimum sentencing scheme in this case has passed beyond the realm of policy debate to the point that enforcement of constitutional norms by this Court is necessary.

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[1] No counsel for a party authored this brief in any part. No person, other than Families Against Mandatory Minimums and its counsel, has made a monetary contribution to the preparation or submission of this brief. See S. Ct. R. 37.6.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Gary Ewing received a sentence of 25 years to life in state prison for shoplifting three golf clubs, a crime so insignificant that California law permits it to be treated as a misdemeanor. Ewing will not be eligible for parole for at least 25 years, and even then, his chance of being paroled is practically nil. Ewing's situation is not unique in California, though it is unique *to* California, or nearly so. Two Justices of this Court observed last year that "some 319 California prisoners are now serving sentences of *25 years to life* for what would otherwise be *misdemeanor theft* under the California scheme." *Durden* v. *California*, 531 U.S. 1184, 1184 (2001) (Souter and Breyer, JJ., dissenting from denial of certiorari). That number is now 344. See CAL. DEP'T OF CORRECTIONS, SECOND AND THIRD STRIKERS IN THE INSTITUTION POPULATION 2 (March 31, 2002). Indeed, the United States Department of Justice concluded that a "*majority* of California inmates have been sentenced [under the Three Strikes law] for non-violent crimes." U.S. DEP'T OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 5 (Sept. 1997) (emphasis added). That is still true. See CAL. DEP'T OF CORRECTIONS, *supra*, at 2-3. Indeed, of 7,167 persons now serving third-strike life terms, nearly 700 were imprisoned for theft, and a similar number were sentenced for simple drug possession. See *ibid.*[2]

As the Court recently confirmed, "[t]he Eighth Amendment succinctly prohibits 'excessive' sanctions." *Atkins* v. *Virginia*, No. 00-8452, 536 U.S. __, slip op. at 5 (June 20, 2002).

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[2] In addition to the 344 persons convicted of petty theft, 108 persons convicted of grand theft and 217 convicted of automobile theft are now serving life sentences with a mandatory minimum of 25 years before parole eligibility. See CAL. DEP'T OF CORRECTIONS, *supra*, at 2.

Excessiveness in sentences assessed in terms of years, like other forms of unconstitutional excessiveness, is measured by the proportionality of the punishment to the offense. A life sentence without possibility of parole for 25 years is grossly and unconstitutionally disproportionate to the crime of theft. Even when the value of the goods stolen permits classification of the crime as a felony, non-violent theft is not among the more serious offenses. California itself treats the crime as a "wobbler," that is, either a misdemeanor or a felony at the option of the prosecutor and the court. While criminal history may justify a sentence at the high end of those constitutionally proportionate to the crime, shoplifting does not become the equivalent of rape or murder because the offender had a criminal past. Past crimes cannot be punished twice. Thus, no matter how serious the *past* crimes, the sentence for a present crime cannot be wholly disproportionate to that particular crime, as Ewing's sentence is here.

Ewing's subjection to life imprisonment without possibility of parole for 25 years results from the confluence of several aspects of California's Three Strikes law. California's law is the only one in the country that combines all of the following characteristics: (i) it does not require the third strike to be a serious or violent offense; (ii) it imposes a minimum sentence of 25 years; (iii) it excludes meaningful opportunities for parole; (iv) it does not require the prior "strikes" to have been tried or punished on separate occasions; and (v) it strictly limits sentencing judges' discretion to impose lesser sentences. In a number of cases, including this one, that combination of factors yields sentences that are "excessive punishments" of the type prohibited by the Eighth Amendment. *Atkins*, 536 U.S. __, slip op. at 6 n.7.

This combination of factors is specific to California's application of its one-size-fits-all mandatory minimum sentencing scheme to minor crimes. Thus, a ruling in

petitioner's favor would not undermine recidivist provisions generally. Few, if any, inmates in other States could present a similar case. The few other States whose laws might facially permit a similar sentence for a similar crime in practice appear to do so with exceeding rarity, while California now confines more than 700 persons under sentences of life without possibility of parole for 25 years for non-violent theft crimes. California's skewed sentencing mechanism has produced an egregiously disproportionate sentence that violates the Eighth Amendment and that therefore cannot stand.

ARGUMENT

It is a cardinal "precept of justice that punishment for crime should be graduated and proportioned to the offense.'" *Atkins*, 536 U.S. __, slip op. at 6 (quoting *Weems* v. *United States*, 217 U.S. 349, 367 (1910)). "[A] criminal sentence must be proportionate to *the crime for which the defendant has been convicted*." *Solem* v. *Helm*, 463 U.S. 277, 290 (1983) (emphasis added). This fundamental principle, which has its origins in the Magna Carta, "is deeply rooted and frequently repeated in common-law jurisprudence." *Id.* at 284. As the Court of the King's Bench declared nearly 400 years ago, "imprisonment ought always to be according to the quality of the offence." *Hodges* v. *Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (quoted in *Solem*, 463 U.S. at 285). Equally "deeply rooted" is the Due Process "principle that punishment should fit the crime." *BMW* v. *Gore*, 517 U.S. 559, 575 n.24 (1996).

This Court has "repeatedly applied this proportionality precept" in Eighth Amendment cases of all kinds. *Atkins*, 536 U.S. __, slip op. at 6. That is not to say that the Constitution requires precise proportionality in sentencing. But it is beyond dispute that punishments that are "grossly disproportional to the gravity" of the offense violate the Eighth Amendment. *Cooper*

Industries v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001) (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)). See also, *e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 997-98 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring).

"A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins*, 536 U.S. __, slip op. at 6. This Court has identified three factors to be considered in assessing the proportionality — and thus the constitutionality — of a criminal sentence: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292. Accord *Cooper Industries*, 532 U.S. at 434; *Harmelin*, 501 U.S. at 1004-1005 (Kennedy, J., concurring).

The first comparison is the most important: measuring the sentence of life without the possibility of parole for 25 years against the gravity of the current crime, shoplifting expensive merchandise. See *Harmelin*, 501 U.S. at 997-1005 (Kennedy, J., concurring). The other comparisons provide objective confirmation for what in this case is obvious: the sentence of life without the possibility of parole for 25 years is grossly disproportionate to the crime of theft even against the backdrop of an array of prior offenses. The sentence accordingly is unconstitutional.

A. A Sentence of Life Without Possibility Of Parole For 25 Years Is Grossly Disproportionate To The Crime Of Non-Violent Theft

A "comparison of the crime committed and the sentence imposed" is the "threshold" test of a disproportionate sentence. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Ewing's sentence of a minimum of 25 years without parole for shoplifting golf clubs clearly crosses that threshold.

1. The primary benchmark against which the proportionality of a sentence is measured is the nature of the current offense for which the defendant is being punished. If that crime is non-violent and relatively minor, the defendant's past offenses cannot justify a draconian sentence. Although "a State is justified in punishing a recidivist more severely than it punishes a first offender," and a defendant's "prior convictions are relevant to the sentencing decision," courts reviewing a claim of cruel and unusual punishment "***must focus on the principal felony*** * * * since [the defendant] already has paid the penalty for each of his prior offenses." *Solem*, 463 U.S. at 296 & n.21 (emphasis added). Where the legislature considers the principal crime to be so minor that it is often charged and punished as a misdemeanor, that focus should be all the sharper. The Constitution permits recidivist statutes to subject repeat offenders to harsher punishment for their most recent crimes, but not to punish them again for previous crimes.

Thus, California cannot constitutionally impose upon a recidivist who commits grand theft an enhanced sentence that exceeds the permissible maximum for ***that*** crime. Just as the "sanction" of a 90-day jail term for drug addiction "would be excessive," *Atkins*, 536 U.S. __, slip op. at 6, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.'" *Solem*, 463 U.S. at 287 (quoting *Robinson* v. *California*, 370 U.S. 660, 667 (1962)).

This Court has noted that a sentence of life imprisonment for the crime of overtime parking would violate the Eighth Amendment. See *Rummel* v. *Estelle*, 445 U.S. 263, 274 n.11 (1980). That would be true even if the driver of the vehicle had a long rap sheet. The driver's criminal history might justify an enhanced penalty, perhaps even a brief stay behind bars. But even if the driver were John Gotti, a State could not constitutionally rely on that history to impose upon him a sentence of the sort usually reserved for murder, for the crime of failing to place another quarter in a parking meter, or jaywalking, or littering — or shoplifting golf clubs.

There is a compelling reason why the constitutionality of a defendant's sentence must be measured by the crime for which he is being punished, and not solely by his status as a repeat offender. "[I]n order to avoid double jeopardy concerns," this Court has "repeatedly emphasized" that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense 'is not to be viewed as * * * [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.' *Witte* v. *United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 732, (1948))." *Riggs* v. *California*, 525 U.S. 1114, 1114 (1999) (op. of Stevens, J., respecting denial of certiorari).[3]

But the penalty, while "stiffened," nonetheless is a penalty for the current offense, not the prior ones. As the Court observed more than a century ago, under the enhanced penalties imposed by a recidivist statute, "the accused is not again

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[3] The former petitioner in *Riggs* is currently serving a sentence of 25 years to life for shoplifting a bottle of vitamins. That sentence also results from the interaction of the Three Strikes law and a wobbler statute. 525 U.S. at 1114.

punished for the first offence"; rather, "the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895) (internal quotation marks omitted).

Accordingly, the fact that Ewing's ***prior*** offenses involved the potential for violence cannot render his current sentence constitutional, because his ***principal*** crime is a non-violent one.[4] The Ninth Circuit has reasoned that "[w]here the crime of conviction is a violent one, a more severe recidivist sentencing scheme for defendants with past convictions for violent crimes would simply reflect a judgment that such individuals cannot curb their violence and should therefore be imprisoned for at least a lengthy time and for as long as life. But where, as here, the present conviction does *not* demonstrate continued proclivity towards involvement in violent crime, distinguishing between criminals convicted for non-violent offenses on the basis of their *past* violence would run up against compelling Double Jeopardy Clause considerations." *Brown* v. *Mayle*, 283 F.3d 1019, 1035 (9th Cir.), petition for cert. filed, 70 USLW 3643 (Mar. 7, 2002) (No 01-1487).

Ewing's sentence cannot be justified on the basis of the State's desire to incapacitate an individual with a ***continued*** propensity to commit violent crimes, because the crime for which Ewing has been sentenced did not demonstrate any such propensity. To the contrary, one who commits a non-violent crime after having a more violent history would seem to be moving in the right direction, still warranting punishment, but

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[4] Ewing accumulated all of his prior strikes in a single criminal proceeding in 1993, in which he was convicted of three counts of burglary and one count of robbery. Two of the burglaries were non-violent. At the third, he brandished a knife; accordingly, that burglary was also charged as a robbery.

not on the scale of a violent offender.[5] Imprisoning a ***non-violent*** offender for more than 25 years on the basis of his ***past*** crimes of violence necessarily would impose an "additional penalty for [his] earlier crimes," for which he has already been punished. *Gryger*, 334 U.S. at 732; see *Solem*, 463 U.S. at 297 n.21; *Riggs*, 532 U.S. at 1114 (op. of Stevens, J., respecting denial of certiorari).[6] See also U.S. Const. amend. V.

2. In striking down a life sentence for passing a $100 "no account" check, this Court emphasized that although the

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[5] Bizarrely, had Ewing *escalated* his wrongdoing sequentially from shoplifting, to burglary, to robbery, his sentence for robbery in that event would be less than his sentence for shoplifting here, since the shoplifting would not qualify as a strike. That is not the only perverse effect of the California scheme. Because the California Three Strikes Law applies to nonviolent crimes and lacks a "wash out period" after which old prior convictions do not count as strikes, many of the inmates serving long sentences under California's Three Strikes law are older felons who are less likely to be dangerous than young, violent offenders. See Mike Males & Dan Macallair, *Striking Out: The Failure Of California's "Three Strikes And You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 67 (1999) (two thirds of offenders sentenced to life without possibility of parole for 25 years under Three Strikes law were between the ages of 30 and 50 at the time of admission to prison).

[6] As the *Brown* court observed (283 F.3d at 1037), moreover, the California statute itself

> does not distinguish between serious and violent prior offenses. Rather, Three Strikes references other sections of the California Penal Code, which exist for other purposes, to define what felonies count as prior strikes. * * * Although certain of these offenses * * * are labeled as violent, * * * [while others] are labeled as serious, the category into which prior convictions fit has absolutely no bearing on the application or length of a Three Strikes sentence.

defendant was sentenced as a habitual offender for having committed his seventh felony, his *principal* felony was "viewed by society as among the less serious offenses." *Solem*, 463 U.S. at 296. The sentence upheld in *Harmelin*, by contrast, was for possession of wholesale quantities of pure cocaine — a crime "far more grave than the crime at issue in *Solem*." 501 U.S. at 1001 (Kennedy, J., concurring). While the crime in *Harmelin* "threatened to cause grave harm to society," shoplifting golf clubs is a "relatively minor, nonviolent crime," *Id.* at 1002 (Kennedy, J., concurring), that is "among the less serious offenses," *Solem*, 463 U.S. at 296, no matter who the shoplifter may be. Ewing's record may provide a context that makes his shoplifting a more serious transgression than a first offense would be, but it is still shoplifting.

In determining whether Ewing's crime is "among the less serious offenses," the Court should focus on the actual conduct at issue, and not on the label placed on that conduct by the State. *Solem*, 463 U.S. at 296. The "absolute magnitude" of an offense is an objective consideration relevant to determining its gravity. *Id.* at 293.

Thus, calling shoplifting a felony instead of a misdemeanor does not alter the fact that the infraction is viewed by society as a relatively minor one. While California's "wobbler" provision permits Ewing's theft of three golf clubs to be charged either as a misdemeanor or as a felony, that very flexibility demonstrates ambivalence about the gravity of the crime even in that State.[7] Ewing's principal crime is not one that is universally recognized as serious and "punishable by significant terms of imprisonment in a state penitentiary." *Rummel*, 445 U.S. at

[7] Standing alone, Ewing's grand theft conviction would have resulted in a sentence of no more than three years, and might have garnered as little as 16 months. Cal. Penal Code §§ 489(b), 18 (West 2001).

274.[8] To the contrary, some States treat theft of property worth $1,200 as a misdemeanor, and most of the other States treat it as a low-grade felony. As a consequence, this offense most often is punished with short — even minimal — sentences.[9] Indeed, some shoplifters in California serve only misdemeanor

[8] Ewing's shoplifting offense did not "involve[] injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon. Nor does the commission of [that crime] ordinarily involve a threat of violent action against another person or his property." *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).

[9] See, *e.g.*, Ariz. Rev. Stat. § 13-701(A), (C)(4) (West 2001) (classifying offense as Class 5 felony punishable by one and one-half years in penitentiary); Del. Code Ann. tit. 11, § 4205 (2001) (Class G felony punishable by not more than two years); Ga. Code Ann. §§ 16-8-2, 16-8-12(a)(1), 17-10-3 (1999) (wobbler offense punishable by up to 12 months in county jail or 1 to 10 years in state penitentiary); Idaho Code § 18-2408(3) (Michie 1997) (misdemeanor punishable by not more than one year in county jail); Ind. Code Ann. § 35-50-2-7(a) (Michie 1998) (Class D felony punishable by one and one-half years in prison); Kan. Stat. Ann. § 21-4704(a) (West 2001) (assigning "severity level nine" to offense, which is punishable by 9 to 11 months in prison); Me. Rev. Stat. Ann. tit. 17-A, § 1252(2)(D) (West Supp. 2001) (Class D crime punishable by less than one year in prison); N.J. Stat. Ann. § 2C:20-11(c) (West 1995) (amended 2000) (disorderly persons offense punishable by no more than six months in prison); N.M. Stat. Ann. § 31-18-15(A)(6) (Michie 2000) (fourth degree felony punishable by 18 months in prison); N.C. Gen. Stat. §§ 15A-1340.17(c), (d); 14-72(a) (1999) (Class H felony punishable by one year to 30 months in prison); Ohio Rev. Code Ann. § 2929.14(A)(5) (West 2001) (fifth degree felony punishable by six to 12 months in prison); 18 Pa. Cons. Stat. Ann. § 1104(3) (West 1998) (first degree misdemeanor punishable by not more than one year in prison); Tex. Penal Code Ann. § 12.21(2) (Vernon 2002) (Class A misdemeanor punishable by not more than one year).

terms in the county jail even when convicted of grand theft, as Ewing was here.

3. The unconstitutional result in this case stems in part from the fact that California's recidivist statute, unlike those of other jurisdictions, shifts the focus almost *entirely* away from the principal crime. Under California's Three Strikes Law, *any* felony — major or minor, violent or non-violent — can serve as the third strike that triggers a sentence of life in prison with no possibility of parole for at least 25 years.[10] That is so even if the "felony" is so marginal that, like the theft in this case, it is not even consistently categorized as a felony at all.

The California statute enumerates the broad set of felonies that the State considers sufficiently "serious" or "violent" to serve as first and second "strikes." Cal. Penal Code §§ 667.5(c)(1), (12), (14); 1192.7(c)(1), (9), (20), (31) (West 2001). If the defendant's ***prior*** offenses were among those enumerated on the list, he is subject to a life sentence, ***regardless of the nature of the principal felony***. Thus, Ewing's conviction for grand theft produced a sentence of life without the possibility of parole for 25 years even though grand theft itself could not even count as a "strike." The California scheme's nearly complete reliance on the nature of the crimes for which a defendant already has been punished, rather than on the gravity of the offense for which he currently is being

[10] By contrast, before the Three Strikes Law, California's recidivism scheme imposed 20 years to life for a third *violent* felony conviction if the defendant served *separate* prison terms for the first two sentences, and provided life without parole for the fourth *violent* felony conviction. Cal. Penal Code § 667(a)(1), (2) (West 1994). Under the current scheme, a defendant with a violent third strike *and* violent priors receives an additional consecutive five-year term *for each prior*, further enhancing the focus on past rather than present conduct. See Cal. Penal Code § 667(a) (West 2001).

sentenced, causes the Three Strikes law to produce sentences that fail even the narrow constitutional proportionality test once "focus" properly rests "on the principal felony." *Solem*, 463 U.S. at 296 n.21.

B. Ewing's Sentence Is Excessive When Compared To Punishments Imposed For The Same Crime In-Other Jurisdictions.

Once "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," a "comparative analysis of sentences" for other crimes in the same jurisdiction is appropriate, as is a similar analysis of sentences for the same crime in other States. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Having nothing to add to the petitioner's persuasive treatment of the *intra*jurisdictional analysis, we focus on a few salient points arising from the *inter*jurisdictional comparison. That analysis reveals that except for Mississippi — which would not have applied its maximum recidivist penalty to Ewing on the basis of his history — no State imposes a *mandatory minimum* for grand theft shoplifting that even approaches the 25 years without parole imposed on Ewing.

This Court recently reaffirmed the importance of the inter-jurisdictional comparison in the evaluation of an Eighth Amendment claim. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. __, slip op. at 7 (internal quotation marks omitted). Accordingly, that California stands nearly alone in punishing shoplifting by a recidivist with a mandatory minimum sentence of life in prison

without the possibility of parole for 25 years is highly probative of that penalty's unconstitutionality.[11]

To our knowledge, no other State would impose a term of imprisonment that approaches the severity of the 25 years to life sentence — with no possibility of parole — imposed on Ewing for the crime of shoplifting three golf clubs with his record of prior offenses. In many States, Ewing's theft would not qualify him for the increased penalties applicable to a habitual offender.[12] Even in States where a thief in Ewing's

[11] In light of the Court's instruction that the constitutionality of a punishment must be measured against the "*evolving* standards of decency," see *Atkins*, 536 U.S. __, slip op. at 6 (emphasis added) (citation and internal quotation marks omitted), the analysis that follows is based upon the current versions of the States' sentencing schemes, not those in place in 1994, when Ewing was sentenced. The differences are not substantial.

[12] Of the 48 States (plus the District of Columbia) with general recidivist statutes, 22 jurisdictions would not apply enhancements under those statutes based upon Ewing's principal crime and criminal history. See Colo. Rev. Stat. § 16-13-01 (West 2001); *Buckingham v. State*, 482 A.2d 327 (Del. 1984); D.C. Code §§ 22-1804, 1804(a) (West 2001); *State v. Harrington*, 990 P.2d 144 (Idaho Ct. App. 1999); 720 Ill. Comp. Stat. § 5/33B-1 (West 2002); Ind. Code § 35-50-2-8 (West 2001); Me. Rev. Stat. Ann. Tit. 17-A, § 1252 (West 2001); Md. Code Ann. Art. 27 § 643B (West 2001); Mass. Gen. Laws Ch. 279, § 25 (West 2002); Minn. Stat. Ann. § 609.1095 (West 2001); Miss. Code Ann. § 99-19-81 (West 2001); Neb. Rev. Stat. § 29-2221 (West 2001); N.H. Rev. Stat. Ann. § 651:6 (West 2001); N.J. Stat. Ann. § 2C:44-3 (West 2002); N.C. Gen. Stat. §§ 14-7.1, 14-7.6 (West 2001); 42 Pa. Stat. Ann. § 9714 (West 2002); R.I. Gen. Laws § 12-19-21 (West 2001); S.C. Code Ann. § 17-25-45 (West 2001); Utah Code Ann. § 76-3-203.5 (West 2001); Va. Code Ann. § 19.2-297.1 (West 2002); Wash. Rev. Code §§ 9.94A.030, 9.94A.570 (West 2002); Wy. Stat. Ann. § 6-10-201 (West 2002). Some of these states would apply a variety of lesser enhancements based on Ewing's

shoes could be sentenced as a recidivist, the resulting sentence would be substantially shorter than that imposed by California in this case.

Several variables determine the impact of each State's recidivist statute. Many commentators have noted that California's Three Strikes Law is more draconian than that of virtually any other State because its legislature took the harshest possible position on nearly every pertinent variable. See, *e.g.*, Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 402 (1997); Marc Mauer, *Why Are Tough On Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11-12 (1999); Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 55-57 (2001).

That is not to say that harshness equates with unconstitutionality. Many sentences may be long, even harsh, but constitutional. But Ewing's sentence results from a bizarre, synergistic reaction among at least five factors: (i) the offenses that qualify as a third strike; (ii) the length of the sentence imposed; (iii) the availability of parole; (iv) the treatment of closely related offenses as separate "strikes"; and (v) the discretion afforded to sentencing courts. That confluence, in this case, has produced a grossly disproportionate — and hence unconstitutional — sentence.

1. ***Grand theft as a third strike.*** Of course, if the most significant enhancements for recidivism do not apply with full force to minor crimes, there is far less risk that a sentence produced by a recidivism enhancement will be grossly and unconstitutionally disproportionate to the crime of conviction. Twelve States minimize the risk of unconstitutional results in

record, but the resulting sentences would not raise constitutional concerns.

this way by providing that only the most serious and violent felonies trigger the heavy penalties imposed by their habitual offender statutes; theft is not among those crimes.[13]

2. ***25-year-to-life sentence for grand theft with priors.*** Although 35 States treat theft of property worth $1,200 as an offense triggering an enhanced penalty, the majority of those States ensure that those penalties are proportionate to the gravity of the offense.[14] Accordingly, in the majority of those States, Ewing would receive a maximum sentence far shorter than life in prison without possibility of parole for 25 years.[15]

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[13] See Colo. Rev. Stat. § 16-13-01; 720 Ill. Comp. Stat. § 5/33B-1; Ind. Code § 35-50-2-8; Me. Rev. Stat. Ann. Tit. 17-A, § 1252; Md. Code Ann. Art. 27 § 643B; Minn. Stat. Ann. § 609.1095; 42 Pa. Stat. Ann. § 9714; S.C. Code Ann. § 17-25-45; Utah Code Ann. § 76-3-203.5; Va. Stat. § 19.2-297.1; Wash. Rev. Code §§ 9.94A.030, 9.94A.570; Wy. Stat. Ann. § 6-10-201.

[14] In nine of those States and the District of Columbia, however, Ewing's record would not expose him to repeat-offender treatment. See pages 20-21 *infra*.

[15] See Alaska Stat. § 12.55.125 (West 2001) (three to five years; presumptive sentence of three years); Ariz. Rev. Stat. § 13-604 (West 2002) (4 to 6 years; presumptive sentence of five years); Conn. Gen. Stat. § 53a-40 (West 2001) (one to ten years); Fla. Stat. Ann. § 775.084 (West 2001) (up to ten years); Ga. Code Ann. § 17-10-7 (West 2001) (ten years); Haw. Rev. Stat. § 706-605.5 (West 2001) (twenty months); Idaho Code § 19-2514 (West 2001) (inapplicable as a result of judicially-imposed separate occurrences requirement, but sentence would be five years if statute were applicable); Iowa Code § 902.8 (West 2002) (three to five years); Kan. Stat. Ann. § 21-4704 (less than eighteen months); Ky. Rev. Stat. Ann. § 532.080 (West 2001) (maximum sentence of five to ten years); Mich. Comp. Laws § 769.12 (West 2002) (up to 15 years); N.J. Stat. Ann. § 2C:44-3 (West 2002) (inapplicable as a result of separate occurrences

Logically enough, many States punish recidivists by sentencing them to the terms normally applicable to an offense one degree more serious than the principal crime. In such jurisdictions, therefore, a recidivist who commits a minor crime receives a substantial, but not unconstitutional, penalty; a recidivist who commits a major crime is locked up for life. In Connecticut, for example, if an offender has a prior felony offense, his sentence for the principal crime is enhanced to the penalty applicable to the "next more serious degree of felony." Conn. Gen. Stat. § 53a-40 (West 2001). Accordingly, in Connecticut Ewing would be sentenced to one to ten years — a substantial penalty for shoplifting, but not one that shocks the conscience. Kentucky, similarly, sentences repeat offenders to a term that would ordinarily be applicable to the "next highest degree" offense, Ky. Rev. Stat. Ann. § 532.080 (West 2001); Ewing would be sentenced to a maximum term of five to ten years. New Mexico would add one year to Ewing's base sentence, for a total term of two and one half years. N.M. Stat. Ann. § 31-18-17 (West 2001). In Georgia, any fourth felony triggers the recidivist statute, but the penalty is the mandatory maximum sentence for the felony charged. See Ga. Code Ann. § 17-10-7 (2001). There, Ewing would receive a maximum sentence of ten years.

3. ***Unavailability of parole and denial of "good time."*** California Three Strikes inmates essentially serve life sentences

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requirement, but sentence would be five to ten years if statute were applicable); N.M. Stat. Ann. § 31-18-17 (West 2001) (two and one half years); N.Y. Penal Law § 70.06 (McKinney 2002) (three to four years); N.C. Gen. Stat. §§ 14-7.1, 14-7.6 (West 2001) (inapplicable as a result of separate occurrences requirement, but sentence would be 80 to 100 months if statute were applicable); N.D. Cent. Code § 12.1-32-09 (West 2001) (maximum of ten years); Tenn. Code Ann. § 40-35-106 (West 2001) (four to eight years); Wis. Stat. Ann. § 939.62 (West 2001) (up to three years).

with only a slim possibility of parole beginning only after the inmate has served 25 years. Ewing, like other Three Strike inmates, will spend at least 25 years behind bars before he will be eligible for parole; he cannot receive any credit for good conduct in prison. See *In re Cervera*, 16 P.3d 176, 180 (Cal. 2001) (holding that a Three Strikes convict must serve at least the full 25-year minimum term). Like every California inmate who is sentenced to life imprisonment with the possibility of parole, Ewing will not be paroled without the approval of the Board of Prison Terms. According to a Board spokeswoman, the Board recommends parole in less than one percent of the 2,000 indeterminate life-imprisonment cases it considers each year. See Paul Van Slambrouck, *Getting Even Tougher*, Christian Science Monitor, May 22, 2000, at 3 (2000 WL 4428277); Dave Lesher, *Davis Takes Hard Line on Parole for Killers*, L.A. Times, April 9, 1999, at A3 (1999 WL 2147545). The rarity of parole is not a passing fad in California. Seven years ago, this Court observed that 90 percent of *all* California inmates are denied parole at their first hearing, and 85 percent fail at subsequent hearings. See *California Dep't of Corrections* v. *Morales*, 514 U.S. 499, 510-11 (1995).

Outside California, the States with the most severe recidivist statutes — the only States in which Ewing could be sentenced as a repeat offender to a lengthy prison term — permit much earlier access to parole. In Alabama, for example, Ewing's theft would constitute a Class B felony, *see* Ala. Code § 13A-8-3 (West 2001), which could result in a sentence of "life or any term of not less than 20 years" under that State's habitual offender statute. *Id.* § 13A-5-9(c)(2). But Ewing would be eligible for parole after the lesser of "one third [of his sentence] or ten years." *Id.* § 15-22-28. Similarly, a Vermont court would have the discretion to impose upon Ewing a sentence of "up to and including life" pursuant to that State's recidivist statute, 13 Vt. Stat. Ann. § 11 (West 2001).

However, even if he were sentenced to life, Ewing would be up for parole after serving only ***one year*** of his sentence. *See* 28 Vt. Stat. Ann. § 501 (West 2001); *State* v. *Battick*, 349 A.2d 221, 222 (Vt. 1975). In Arkansas, Ewing's sentence would be between 3 and 20 years, but he would be up for parole after serving one third of his sentence. Ark. Code Ann. §§ 5-4-501, 16-93-608 (West 2001).[16]

The unavailability of parole in California is of constitutional significance. This Court upheld the sentence in *Rummel* in large part because the petitioner — unlike Ewing — was likely to be paroled early. Under the Texas system at issue in that case, a prisoner serving a life sentence could be eligible for parole in ten years and would be expected, in the ordinary course of events, to be eligible in twelve years. 445 U.S. at 280; see also *Solem*, 463 U.S. at 301-02. Ewing, by contrast, will not be eligible for parole for at least 25 years, and even then the chances against parole are 99 to 1. See Lesher, *supra*.

In determining whether a sentence is grossly disproportionate to the crime, this Court considers the actual operation of the parole policy, and not just its existence:

> In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to

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[16] See also Mo. Rev. Stat. §§ 558-016, 558.011 (West 2002) (Ewing would be sentenced to a term "not to exceed twenty years," but would be eligible for parole after 15 years); Mont. Code Ann. §§ 46-18-501, 46-18-502, 46-23-201 (West 2001) (Ewing would be sentenced to between ten and 100 years, but would be eligible for parole after one-fourth of term); Tex. Gen. Laws § 12.43, Tex. Gov't § 508.145 (sentence would be between two and 20 years, but Ewing would be eligible for parole after serving one fourth of his sentence); W. Va. Code §§ 61-11-18, 62-12-13(c) (West 2001) (court could but likely would not, (see page 24 *infra*) impose a life sentence, but Ewing would be eligible for parole after 15 years).

> the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners * * * ."

Solem, 463 U.S. at 301 (emphasis added), quoting *Rummel*, 445 U.S. at 280. In *Solem*, this Court stated that the petitioner's lack of opportunity for parole rendered his sentence "far more severe than the life sentence we considered in *Rummel*." 463 U.S. at 297. Ewing can receive no credit for good time, and cannot even seek parole for 25 years. Because Ewing is likely to spend the rest of his life in prison, the sentence imposed here is as disproportionate as that deemed unconstitutional in *Solem*, and is "far more severe" than that upheld in *Rummel*.

4. ***No "separate occurrences" requirement.*** Ewing's four prior convictions all resulted from a single criminal proceeding in 1994. Accordingly, Ewing would not be subject to the habitual offender statutes of Delaware, the District of Columbia, Idaho, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, or Rhode Island.[17] With some variations on the theme, all of those States provide that prior

[17] See *Buckingham v. State*, 482 A.2d 327 (Del. 1984); D.C. Code §§ 1804, 1804(a); *State v. Harrington*, 990 P.2d 144 (Idaho Ct. App. 1999); Miss. Code Ann. § 99-19-81; Neb. Rev. Stat. § 29-2221; N.H. Rev. Stat. Ann. § 651:6; N.J. Stat. Ann. § 2C:44-3; N.C. Gen. Stat. §§ 14-7.1, 14-7.6; R.I. Gen. Laws § 12-19-21. The recidivist statutes of Colorado, Illinois, Indiana, Maryland, Minnesota, Virginia, Washington, and Wyoming also include separate-occurrences provisions that would preclude Ewing from being sentenced as a multiple offender; however, those states also would not characterize Ewing's theft as a triggering offense, would not consider his prior offenses to be strike crimes, or both. In some of those states, Ewing might be subject to lesser enhancements based on his record, but the general habitual offender statute would not apply and Ewing would not be subject to a sentence approaching the 25 years to life that he received in California.

felony convictions only count as separate "strikes" if they arose from separate proceedings or resulted in separate sentences. See, *e.g.*, Miss. Code Ann. § 99-19-81 (West 2001). Under such statutes, Ewing's prior convictions would only count as one "strike," because he was charged in a single proceeding and served one term in prison.

The separate-occurrences requirement recognizes that habitual criminals should only be subjected to greatly enhanced sentences if they demonstrate a repeated failure to learn from the consequences of their felonious acts and to modify their behavior. This Court found that factor significant in *Rummel*, observing that under the Texas statute, "the State must prove that each succeeding conviction was subsequent to both the commission of and the conviction for the prior sentence." 445 U.S. at 278 n.16.[18] All of Ewing's strike convictions occurred at once and resulted in a functionally single term of incarceration. Moreover, the crime that triggered the application of the recidivism statute was far less serious than the crimes that qualified him for such treatment.

5. California's mandatory minimum deprives sentencing courts of almost all discretion. At first glance, Nevada's habitual offender statute appears as harsh or harsher than California's with respect to its penalty for grand theft with priors. Under the Nevada statute, Nev. St. § 207.010(1)(b) (West 2001), a four-time felon like Ewing could theoretically be sentenced to life without parole.

There is an important practical difference between the Nevada and California regimes, however: Nevada courts have much greater discretion to impose lighter sentences. First of

[18] Pursuant to Texas' separate occurrences provision, Ewing would be subject to a penalty under the habitual offender as a second-time offender. He would, however, be eligible for parole after serving one-fourth of his sentence. See n. 16 *supra*.

all, in Nevada the sentencing court has an affirmative obligation to consider whether it is appropriate to sentence a defendant as a habitual offender. See, *e.g.*, *Clark* v. *State*, 851 P.2d 426, 429 (Nev. 1993) ("[I]t was incumbent upon the trial court to weigh properly whether the habitual criminality count should have been dismissed pursuant to [its] discretion.").[19]

Even more significantly, as this Court observed in *Solem* (463 U.S. at 300), the Nevada statute expressly provides that, even after determining that the defendant is a habitual offender, the court can choose to impose a shorter sentence. Two of the court's three sentencing options are (i) life with the possibility of parole and (ii) a definite term of twenty-five years with the possibility of parole. In either case, and by contrast with California, *parole eligibility begins after only ten years* of time served. See Nev. Rev. Stat. § 207.010(1)(b). Other States with schemes less severe than Nevada's also provide greater discretion to the sentencing court so that excessive punishments can be avoided.[20]

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[19] California courts have limited discretion to strike allegations of prior convictions, and thereby to avoid application of the statute. See *People* v. *Superior Court of San Diego (Romero)*, 917 P.2d 628 (Cal. 1996). Unless a court takes the extraordinary step of "striking a strike," it *must* impose a sentence of 25 years to life, despite the fact that the defendant will not be eligible for parole until he has served 25 years. See *id.* at 648 ("To guide the lower courts in the exercise of their discretion * * * we emphasize the following: A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited."); Cal. Penal Code § 667(e)(2)(A) (West 1994).

[20] See, *e.g.*, Conn. Gen. Stat. § 53a-40(h) (enhanced sentence is only imposed if the defendant "has been found to be a persistent dangerous felony offender," *and* "the court is of the opinion that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest"). In Vermont, similarly, a court would have discretion to sentence Ewing to the sentence that is specified for his shoplifting offense standing alone. See Vt. Stat. Ann. tit. 13, §§ 11, 501; *State* v. *Angelucci*, 405 A.2d 33 (Vt. 1979). See also, *e.g.*, Ark. Code Ann. § 5-4-501 (setting broad sentencing ranges for repeat offenders; Ewing's sentence would be between 3 and 20 years); Del. Code Ann. tit. 11 § 4214(a) (West 2001) (same; sentence would be between 2 years and life) (note that Ewing would not be sentenced as a repeat offender in Delaware as the result of a court-imposed separate offense requirement); Mich. Stat. Ann. § 769.12 (West 2002) (same; sentence would be any term up to 15 years); Okla. Stat. Ann. Tit. 21, § 51.1 (West 2001) (setting broad sentencing ranges for repeat offenders; sentence would be four years to life); S.D. Codified Laws § 22-7-8 (Michie 2001) (same; sentence would be "up to life," but statute sets no minimum term; if Ewing were sentenced to any term less than life, he would be eligible for parole after serving three-eighths of his sentence).

As this Court explained in *Solem*, it is generally the role of the courts to make distinctions among offenders, "and courts traditionally have made these judgments — just as legislatures must make them in the first instance." 463 U.S. at 292. The lower courts are quite capable of using their discretion to "judge the gravity of an offense, at least on a relative scale. * * * Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." *Ibid.* In determining the gravity of a particular offense, courts can consider not only the "absolute magnitude of the offense" and whether violence is involved, but also more subtle factors, such as the defendant's intent and his motive. *Id.* at 293. Courts also can "compare different sentences. * * * The courts are constantly called upon to draw similar lines in a variety of contexts." *Ibid.*

In California, the legislature has removed from the courts the power to distinguish among offenders and offenses: it has mandated that all third-time felony offenders be treated alike. By contrast, in the States where courts retain some discretion in

sentencing recidivists, that appears sufficient (with extremely rare exceptions) to prevent the imposition of sentences so grossly disproportionate as to raise the constitutional issues presented here and in the cases of the hundreds of other Californians imprisoned for a mandatory minimum of 25 years, and probably for life, for non-violent theft. That discretion generally keeps the systems in other States within constitutional bounds. But that constitutional failsafe is absent in California.

* * *

Enforcing the constitutional guarantee against excessive punishments in this case would not unduly impose federal standards on state police powers. State courts themselves have stepped in to invalidate as unconstitutionally excessive sentences imposed under circumstances similar to those here. In States in which the statutes facially permit such excesses, and lower courts have not exercised their discretion to keep the sentences within permissible bounds, state supreme courts have relied upon state and federal constitutional provisions to enforce mainstream notions of proportionality.

Although the statutes of Louisiana, for example, at one time appeared to authorize a life sentence for recidivists who committed non-violent theft crimes, the Louisiana courts would not permit that outcome. When the Louisiana Supreme Court considered whether a life sentence under the Louisiana recidivism statute could be imposed upon a "fourth offender" who was "before the court on [a] non-violent crime" — possessing stolen property — the court observed that the sentence "appears to be unconstitutionally excessive," vacated the sentence, and remanded for resentencing. *State ex rel. Walgamotte* v. *Blackburn*, 481 So. 2d 1322, 1323 (La. 1986).[21]

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[21] See also, *e.g.*, *State* v. *Lindsey*, 770 So. 2d 339, 343-44 (La. 2000) (holding that life sentence imposed for purse snatching under habitual offender statute violated Louisiana Constitution), cert. denied, 532 U.S. 1010 (2001); *State* v. *Dorthey*, 623 So. 2d 1276, 1280 (La. 1993) ("Louisiana's judiciary maintains the distinct responsibility of reviewing sentences imposed in criminal cases [under the habitual offender statute] for constitutional excessiveness."); *State* v. *Hayes*, 739 So. 2d 301, 303-04 (La. Ct. App. 1999) (sentence of life imprisonment without parole was excessive penalty for theft of $1,000).

In West Virginia, if Ewing were prosecuted under the general petit larceny statute, W. Va. Code § 61-3-13 (West 2001), rather than the shoplifting statute that fits his crime more closely, *id.* § 61-3A-1 *et seq.*), his offense might in theory might have led to a life sentence. See *id.* § 61-11-18. West Virginia case law, however, would not permit that result. The Supreme Court of Appeals of West Virginia struck down a statute providing a mandatory *one-year* sentence for felony third-offense shoplifting as a violation of both state and federal proscriptions of cruel and unusual punishment, being unable "with a clear collective conscience, [to] conclude that Appellant deserves to be imprisoned for a minimum of one year for failing to pay for $8.83 worth of groceries." *State* v. *Lewis*, 447 S.E.2d 570, 575 (W. Va. 1994). The same court likewise has held unconstitutional on state-law grounds mandatory life sentences imposed under a general recidivist statute for petty forgeries. *State* v. *Barker*, 410 S.E.2d 712, 713-14 (W. Va. 1991); *Wanstreet* v. *Bordenkircher*, 276 S.E.2d 205, 211-14 (W. Va. 1981). And that court held unconstitutionally excessive a life sentence for possession of marijuana with intent to distribute it, even though the defendant's prior offenses included unlawful wounding. *State* v. *Deal*, 358 S.E.2d 226, 230-31 (W. Va. 1987). Accordingly, the courts of West Virginia would not countenance a sentence of life without the

possibility of parole for 25 years for the crime of shoplifting golf clubs.[22]

The California courts, by contrast, have repeatedly declined to impose limits on the application of the Three Strikes Law to "wobblers" or other non-violent crimes. See, *e.g.*, *People* v. *Cline*, 60 Cal. App. 4th 1327 (1998) (upholding sentence of life without parole for 25 years for grand theft); *People* v. *Terry*, 47 Cal. App. 4th 329 (1996) (upholding sentence of life without parole for 25 years for third strike of petty theft that "wobbled up" to a felony).

No single feature of California's Three Strikes statute makes it unique among the States. Rather, it is the fact that California stakes out the most extreme position on every pertinent variable that renders many of the sentences imposed under it, including Ewing's, uniquely and grossly disproportionate. No other State's recidivist statute is triggered by any felony, no matter how minor; provides for a mandatory minimum sentence of 25 years to life; denies parole to all three-strikers as a matter of law for the first 25 years of their sentences; counts as separate strikes prior felonies that were all adjudicated in a single proceeding; ***and*** grants its courts almost no discretion to impose a reduced enhancement where the principal crime is a minor one. In no other State would Ewing be sentenced to 25 years to life for shoplifting three golf clubs. That circumstance confirms the "inference of gross disproportionality" (*Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)) that arises from the mere comparison of that sentence with that crime. The sentence is unconstitutional, and should be vacated.

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[22] In any event, a recidivist receiving a life sentence in West Virginia is eligible for parole after serving 15 years (W.Va. Code § 62-12-13(c)) (West 2001). That is ten years sooner than Ewing is likely to have his first opportunity for parole.

CONCLUSION

The judgment of the Court of Appeal of the State of California should be reversed.

Respectfully submitted.

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JULY 2002

(10)

Supreme Court, U.S.
FILED
JUL 31 2002
OFFICE OF THE CLERK

No. 01-6978

In the
Supreme Court of the United States

Gary A. Ewing,
Petitioner,

v.

State of California,
Respondent.

On Writ of Certiorari to the
California Court of Appeal, Second Appellate District

BRIEF OF THE STATES OF ALABAMA, INDIANA, NEBRASKA, OKLAHOMA, OREGON, TEXAS, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA

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July 31, 2002

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INTEREST OF AMICI CURIAE

Amici curiae States of Alabama, Indiana, Nebraska, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming respectfully submit this brief, pursuant to Sup. Ct. R. 37.4, in support of the respondent State of California, urging this Court to affirm the judgment of the California Court of Appeal and reject Ewing's claim that his sentence of twenty-five years to life in prison violates the Eighth Amendment. Because Ewing was sentenced under California's habitual offender statute (the "Three Strikes Law"), the outcome of this case may affect the validity of other criminal recidivist statutes. As of 1992, "[s]uch laws [were] in effect in all 50 States . . . and several ha[d] been enacted by the Federal Government, as well." *Parke v. Raley*, 506 U.S. 20, 26 (1992) (citations omitted). Amici submit this brief to defend these statutes and to protect their valid and long-recognized interest in punishing more severely those criminal offenders who "by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society . . . ." *Rummel v. Estelle*, 445 U.S. 263, 276 (1980).

SUMMARY OF ARGUMENT

To show that his is one of those rare sentences that violates the Eighth Amendment, Ewing must demonstrate more than just a lack of strict proportionality between the crime and sentence. Rather, he must demonstrate that he is suffering under an "extreme sentence [that is] 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ.). Because Ewing's sentence was based not only on his most recent felony offense but also on

California's "valid interest in deterring and segregating habitual criminals," *Parke v. Raley*, 506 U.S. 20, 27 (1992) (citing *Rummel*, 445 U.S. 263, 284 (1980)), any proportionality review must place great weight on his status as a recidivist. Imposing a harsher sentence upon one with previous felony convictions is a "practice . . . no longer open to serious challenge." *Oyler v. Boles*, 368 U.S. 448, 451 (1962). For one who has previously been convicted of two serious or violent felonies and has now been convicted of a felony again, a sentence of twenty-five years to life does not raise an inference of gross disproportionality.

Even if Ewing could raise the inference that his sentence is "grossly disproportionate" to his offense, an intra/interjurisdictional comparative analysis does not validate the inference. Indeed, Ewing's attempt to demonstrate the contrary only establishes that such an analysis does not provide the "objective criteria" necessary for proportionality review. For example, in conducting his intrastate analysis, Ewing compares only what he considers comparable and ignores the relevance of sentences imposed upon recidivists who have committed similar offenses. According to Ewing's own brief (p. 23), however, more than 2,000 other recidivists in California have received identical sentences for committing "property crimes." His sentence is, therefore, not disproportionate to those imposed in similar circumstances.

Likewise, the interjurisdictional analysis conducted by Ewing is outcome-based and flawed. He discounts the comparative relevance of state statutes authorizing similar punishments on the basis that the imposition of the equivalent sentence is not mandatory, but simply at the top of the statutory range. If the goal is,

however, to seek "objective" evidence of whether other States deem similar punishments in similar circumstance to be appropriate, the maximum punishment authorized should be the only consideration. Considering that a judge in another State might impose a lesser sentence while ignoring the objective evidence of what the legislature has deemed an appropriate punishment does not provide a basis for meaningful comparison. Moreover, in discounting the severity of other state statutes because of discretionary aspects, Ewing ignores the discretionary aspects of California's "Three Strikes" law. Utilizing Ewing's reasoning, a court reviewing a sentenced imposed elsewhere could discount the severity of California's statute on the basis that, in California, a trial judge has the discretion to strike prior felony convictions thereby completely removing a defendant from the effects of the "Three Strikes" law. Similarly, making comparisons on the basis of parole eligibility does not result in the "objective criteria" necessary for proportionality review. Unless one takes into account the specific provisions of each parole system under consideration, no meaningful comparison can be made.

Finally, even if Ewing's analysis could accurately be labeled objective, and assuming he has established that his sentence is the most severe imposed for a similar offense in the Country, such would not render his sentence unconstitutional. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other state." *Rummel*, 445 U.S. at 282 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). If California is that State, it may be a

result of unique concerns and issues which necessitate the distinction. Defining criminal offenses and sanctions requires a balancing of various penological goals such as retribution, deterrence, incapacitation, and rehabilitation. California has reasonable determined to place more weight upon deterrence and incapacitation in cases where an individual, having "been both graphically informed of the consequences of lawlessness and given an opportunity to reform, . . . commits yet another felony." *Rummel*, 445 U.S. at 278. Its judgment should not be overturned lightly.

ARGUMENT

In 2000, petitioner Gary Ewing was convicted of one count of felony grand theft of personal property, in violation of California Penal Code Section 487(a), for stealing three golf clubs valued at $1,200 from a pro shop. (Clerk's Tr. at 80–81) Ewing had previously been convicted of three counts of residential burglary and one count of robbery, each of which is considered to be a serious or violent felony under California's recidivist statute. (Clerk's Tr. at 90) Because he had two or more serious or violent felony convictions, the trial court sentenced Ewing to twenty-five years to life in a state penitentiary. (App. 13–15) In view of his habitual offender status, Ewing's sentence was not disproportionate to his crime.

I. This Court Need Not Engage in Any Intra/Interjurisdictional Analysis of Ewing's Sentence, Because His Sentence Is Not "Grossly Disproportionate" to His Crime When Considered in the Light of His Habitual Offender Status.

A. In *Harmelin v. Michigan*, this Court limited the intra/interjurisdictional analysis of *Solem v. Helm* to those rare cases in which the defendant makes the threshold demonstration that his sentence was "grossly disproportionate" to his crime.

This Court has rarely accepted the claim that a sentence is disproportionate to the crime and therefore violates the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."). Most recently, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), this Court rejected the petitioner's claim that his sentence to life in prison without the possibility of parole was "significantly disproportionate" to the crime he had committed — possession of 672 grams of cocaine. *Harmelin*, 501 at 961. The Chief Justice and Justice Scalia would have ruled that "the Eighth Amendment contains no proportionality guarantee" at all. *Id.*, at 965 (Scalia, J., joined by the Chief Justice). In a narrower statement that constitutes the controlling opinion in the case,[1] Justice Kennedy, joined by Justices O'Connor

[1] *Nichols v. United States*, 511 U.S. 738, 745 (1994) ("When a fragmented Court decides a case and no single

and Souter, ruled that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*, at 1001 (Kennedy, J., joined by O'Connor and Souter, JJ.).

Even before *Harmelin*, this Court had made clear that a defendant bore a heavy burden to establish that his sentence was disproportionate to his crime. In *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court refused to strike down a sentence of life imprisonment imposed under a recidivist statute providing that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.*, at 264. While the petitioner's most recent offense was relatively minor — obtaining $120.75 by false pretenses — this Court acknowledged the State's interest to punish more severely "those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.*, at 276. Two years later, in a per curiam opinion, this Court likewise rejected a claim that a "40-year sentence was so grossly disproportionate to the crime of possessing less than nine ounces of marihuana that it constituted cruel and unusual punishment." *Hutto v. Davis*, 454 U.S. 370, 371 (1982).

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rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting *Marks v. United States*, 430 U.S. 188 (1977)).

The 1983 case of *Solem v. Helm* was the first and only decision by this Court to invalidate as disproportionate a sentence imposed under an habitual offender statute. 463 U.S. 277, 303 (setting aside sentence of life without parole for habitual offender whose most recent crime had been passing bad check of $100). In so doing, *Solem* set forth a three-factor test — "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions" — for analyzing the proportionality of a given sentence. *Id.* at 292. In *Harmelin*, however, Justice Kennedy clarified that the *Solem* test did not come into play until after a reviewing court had made the threshold determination that the sentence was "grossly disproportionate" to the crime. *Harmelin*, 501 U.S. at 1005. "A better reading of [this Court's] cases," Justice Kennedy said, "leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.*

B. The threshold determination whether a defendant's sentence is "grossly disproportionate" to his crime should logically take into account the defendant's habitual offender status.

In short, this Court should not engage in any sort of intra/interjurisdictional comparative analysis unless it first finds that Ewing's sentence of twenty-five years to life is "grossly disproportionate" to his crime. In making this threshold determination, moreover, this

Court should take into account an additional factor not present in *Harmelin*: the fact that the California court enhanced Ewing's sentence because he belonged to the category of offenders "who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276. The harsher sentence imposed upon Ewing was a direct result of his habitual criminal activity, not just of his most recent crime. Any proportionality analysis of the sentence he received must, therefore, place great weight upon his habitual offender status.

This Court has long upheld the right of the States to punish habitual offenders much more severely than their instant violation might otherwise warrant. "States have a valid interest in deterring and segregating habitual criminals." *Parke v. Raley*, 506 U.S. 20, 27 (1992) (citing *Rummel*, 445 U.S. at 284). "Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke*, 506 U.S. at 26. "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912). By 1992, "[s]uch laws [were] in effect in all 50 States . . . and several ha[d] been enacted by the Federal Government, as well." *Parke*, 506 U.S. at 26–27 (citations omitted). Cf. *Atkins v. Virginia*, 536 U.S. ___, ___ (2002) (slip op. at 11) ("the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal").

In short, the States have found habitual offenders to be categorically *more* culpable than the average criminal.

This Court first upheld the constitutionality of a state recidivism statute in the 1895 case of *Moore v. Missouri*, 159 U.S. 673. "Similar provisions", the Court noted, "have been contained in state statutes for many years, and they have been uniformly sustained by the courts." *Id.*, at 676. In *Moore*, the petitioner had been indicted for burglary in the first degree and larceny in a dwelling house. *Id.*, at 673. He had previously been convicted of grand larceny and had served a sentence of three years. *Id.* Moore was convicted of burglary in the second degree and, pursuant to Missouri's "Second Offence" statute, sentenced to life in prison. *Id.* Even though, because of the prior conviction, Moore was subjected to a much more severe sentence, the Court rejected Moore's claim that the punishment was "cruel and unusual" and held that a "state may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law." *Id.*, at 678. In so ruling, the Court did not conduct any sort of proportionality analysis. Rather, it simply cited *In re Kemmler*, 136 U.S. 436 (1890), a decision upholding execution by electrocution.

In 1901, this Court noted that "[s]tatutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts," and upheld a Massachusetts statute "aimed at habitual criminals." *McDonald v. Massachusetts*, 180 U.S. 311, 312. Eleven years later, this Court upheld against an Eighth Amendment challenge a West Virginia Statute requiring the

imposition of a life sentence upon any individual convicted after having "been twice before sentenced in the United States to confinement in a penitentiary." *Graham*, 224 U.S. at 622; see also *Gryger v. Burke*, 334 U.S. 728, 732 (1948). Recognizing this unbroken line of jurisprudence, this Court declared in 1962 "that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge." *Oyler v. Boles*, 368 U.S. 448, 451; see also *Spencer v. Texas*, 385 U.S. 554, 559 (1967) ("No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases").

The decisions above did not turn on issues such as those considered by the Ninth Circuit in *Andrade v. Attorney General of California*, 270 F.3d 743, 748 (9th Cir. 2001)[2] — whether the "triggering offense" could be labeled "serious"; and, whether the statute in question provided for a "washout" period, after which prior convictions will no longer be considered. Rather, the decisions rested on the simple proposition that the States had an interest in "inflicting severer punishment upon old offenders." *Graham*, 224 U.S. at 616. Not until *Solem v. Helm* did this Court so much as suggest that, in considering the constitutionality of a sentence imposed pursuant to an habitual offender statute, the "focus [must be] on the principal felony — the felony that triggers the life sentence." 463 U.S. at 296 n. 21. Such a "requirement" is inconsistent with the very purpose of recidivism statutes, under which prior convictions are more than just "relevant to the

[2] On April 1, 2002, this Court granted California's petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit in this case. *Lockyer v. Andrade*, 01-1127.

sentencing decision." *Id.*[3] When enhancing a sentence due to recidivism, the prior convictions are the main reason for the sentencing decision. *Graham*, 224 U.S. at 616 ("the repetition of criminal conduct aggravates . . . guilt and *justifies* heavier penalties") (emphasis added); *Moore*, 159 U.S. at 677 ("increase [in] punishment *by reason of the commission of the first offense* was not cruel and unusual") (emphasis added).

If a defendant's recidivism is a legitimate basis for an increase in his punishment, it logically should also be a factor considered by a court that is reviewing the proportionality of that punishment. Prior to *Solem*, this Court had rejected the notion that a reviewing court had to determine proportionality by reference only to the "triggering offense." In *Rummel*, this Court stated that it "need not decide whether Texas could impose a life sentence upon Rummel merely for obtaining $120.75 by false pretenses." *Id.* at 276. "[H]ad Rummel only committed that crime, . . . he could have been imprisoned for no more than 10 years." *Id.* This Court gave considerable weight to the State of Texas' interest in punishing recidivism in determining

[3] This is not the only reasoning employed in *Solem* that is demonstratively inconsistent with other decisions of this Court. For example, in striking down the sentence in *Solem*, the Court considered individual characteristics of the petitioner – e.g., his age, his addiction to alcohol – and determined that, because parole was not available, "[n]either Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation." *Id.* In *Harmelin*, a clear majority of this Court expressly rejected the relevance of such considerations. *Harmelin*, 501 U.S. at 996 ("We have drawn the line of required individualized sentencing at capital cases and see no basis for extending it further.").

that the life sentence Rummel received did not violate the Eighth Amendment. Similarly, here, "the interest of the State of [California] is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." 445 U.S. at 276.

Solem did not expressly overrule *Rummel*, and *Harmelin* in turn limited the reasoning of *Solem* to those rare cases in which a defendant was able to make a threshold demonstration that his sentence appears "grossly disproportionate" to his crime. Logically, then, the defendant's habitual offender status must remain at least a factor in the threshold determination of "gross disproportionality." Here, Ewing's recidivism is the primary reason for the sentence imposed upon him. It would make little sense for it to be separated from the "threshold comparison of the crime committed and the sentence imposed." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., joined by O'Connor and Souter, JJ.).

C. Ewing's sentence is not "grossly disproportionate" to his crime of felony grand theft and his habitual offender status.

In short, contrary to Ewing's contention (Br. 23), the "threshold comparison" here is not whether "a sentence of life imprisonment without possibility of parole for twenty-five years for shoplifting three golf clubs raises an inference of gross disproportionality." Rather, the question is whether, upon conviction for a felony after having been previously convicted of two

serious or violent felonies, a sentence of twenty-five years to life raises an inference of gross disproportionality.

Under the analysis Ewing erroneously proposes, his repeat offender status would not be relevant unless an inference of gross disproportionality is drawn. At that point, moreover, Ewing contends (Br. 29) that his repeat offender status would be relevant only to consider "whether the state's interest in enhancing punishment for habitual offenders can rebut the inference of gross disproportionality." This proposition is inconsistent with the indisputable fact that Ewing's recidivism is the reason for his harsher sentence. As demonstrated, separating the recidivism factor from the analysis is irreconcilable with the purpose of recidivist statutes and this Court's unbroken line of cases affirming that purpose.

In attempting to bolster his claim of "gross disproportionality," Ewing points (Br. 29) to what he describes as "grand theft's modest placement on the spectrum of crimes" and notes that "the state has established a low sentencing range for the offense (absent application of the Three Strikes law)." Because he is a recidivist, Ewing's comparison of his plight to that of a first-time offender — as well as his analysis of other kinds of enhancements that are not related to prior convictions (Br. 26) — is little more than wishful thinking. The sentence imposed upon the habitual offender is a result of the State's legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276. A first-time offender has not yet

demonstrated that criminal sanctions will not be a deterrent to future criminal activity or that efforts at rehabilitation will be futile. Ewing, on the other hand, has demonstrated both. He committed the current offense while on parole less than a year after his early release from prison. His sentence was not, therefore, "grossly disproportionate" to his offense.[4]

II. Even if Ewing Were to Pass the Difficult Threshold Requirement That His Sentence Be "Grossly Disproportionate" to His Crime, the Intra/Interjurisdictional Analysis of *Solem v. Helm* Would Be Unavailing to Him.

If there is a "proper role for comparative analysis of sentences, [it] is to validate an initial judgment that a sentence is grossly disproportionate to a crime." *Harmelin*, 501 U.S. at 1005. Here, because Ewing's sentence is not "grossly disproportionate" to his crime, no such analysis is necessary. In addition, the analysis offered by Ewing — and that conducted by the Ninth

[4] In reaching an initial determination that Andrade's sentence was "grossly disproportionate," the Ninth Circuit considered Andrade's age and, applying life expectancy statistics, concluded that "it is thus more likely than not that [he] will spend the remainder of his life in prison." *Andrade v. Attorney General of California*, 270 F.3d 743, 759 (9th Cir. 2001). In doing so, that court ignored this Court's admonition that it has "drawn the line of required individualized sentencing at capital cases, and see[s] no basis for extending it further." *Harmelin*, 501 U.S. at 996. To his credit, Ewing does not appear to rely upon any of his individual characteristics and circumstances in asserting that his sentence is disproportionate.

Circuit in the *Andrade* case — demonstrates that such a rule is unworkable.

A. An intrajurisdictional comparative analysis of Ewing's sentence requires much more information than Ewing has provided in this case.

In conducting his "intrastate analysis," Ewing does not address what would seem to be the most relevant comparison — sentences imposed upon recidivists for offenses similar to his own. Worse yet, the Ninth Circuit expressly discounted this aspect of the analysis in *Andrade*, instead "compar[ing] what *they* consider[ed] comparable." *Harmelin*, 501 U.S. at 988 (Scalia, J., joined by the Chief Justice). Specifically, the Ninth Circuit "agree[d] that comparisons to sentences for other recidivists are relevant, [but expressed a] problem with . . . attempt[ing] to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute." *Andrade*, 270 F.3d at 762.

The issue as framed by that court, however, was not the constitutionality of California's Three Strikes Law, but instead whether "the application of the Three Strikes law to the unusual circumstances of Andrade's case" resulted in a constitutionally disproportionate sentence. *Id.* at 767. To determine whether a particular sentence is "disproportionate," it would seem necessary to consider sentences imposed in similar cases. When such a consideration is undertaken, an intrastate analysis reveals that Ewing's sentence is not disproportionate. Ewing himself notes (Br. 23) that 2,158 other habitual offenders were "sentenced to twenty-five years to life for property crimes, including

grand theft (108), petty theft with a prior (344), vehicle theft (217), receiving stolen property (164), forgery (58), and second degree burglary (455)."

As pointed out above, moreover, because Ewing was sentenced as an habitual offender, comparing his sentence to those imposed upon first-time offenders is meaningless. Even if the crime of the first time offender is more severe — assuming that point can be agreed upon — the penological goal in imposing the sentence is different.

For example, Ewing asserts (Br. 40) that "if a person with no criminal past had entered the golf pro shop the day after [he] did, and was later convicted of detonating a bomb with the intent to kill the clerk," that individual would be parole-eligible much sooner than he would. The sentence imposed upon the hypothetical first-time offender, however, is determined by weighing various penological considerations such as retribution, deterrence, rehabilitation, and incapacitation. "[T]he responsibility for making these fundamental choices . . . lies with the legislature." *Harmelin*, 501 U.S. at 998 (citing *Gore v. United States*, 357 U.S. 386, 393 (1958)). That the parole eligibility date in such a case would arrive sooner than Ewing's simply reflects a reasonable determination that, as a first-time offender, the hypothetical individual should be given a chance — just as Ewing was given a chance — to demonstrate that the criminal sanctions imposed had rehabilitated him and were sufficient to deter future criminal activity.

Ewing, by contrast, has demonstrated that spending approximately five years in prison did not deter him from committing another felony less than a

year after his release. He has also demonstrated that he was not receptive to opportunities for rehabilitation by committing felony grand theft within ten months of his early release on parole.

B. An interjurisdictional comparative analysis of Ewing's sentence is similarly unworkable.

While an intrastate comparison is difficult enough, much more problematic is the "objective" comparison of Ewing's sentence to "sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 291. This requires the comparison of what was essentially deemed incomparable in *Harmelin*. More specifically, an interstate comparative analysis is inconsistent with the "common principles . . . of proportionality review" that Justice Kennedy identified in that case. *Harmelin*, 501 U.S. at 998. One such principle recognizes that "[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system." *Id.* at 998. A second principle, however, is that the Constitution requires no such agreement between the varying sentencing systems of the States — "that the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* at 999. A third principle requires recognition that the lack of consensus among the States is both unavoidable and beneficial — that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Id.* If agreement on the purposes and objectives of the penal system is a prerequisite to comparison, but no such agreement exists, it necessarily follows that no

legitimate comparative analysis can be undertaken. *Harmelin*, 501 U.S. at 999–1000 ("State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise"). Moreover, "even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes." *Id.*, at 1000.

Contrary to the reasoning of *Solem*, therefore, an interstate comparison does not result in the consideration of "objective criteria." *Id.* Rather, as is demonstrated by the interstate analysis proffered by Ewing and the one employed by the Ninth Circuit in *Andrade*, it allows judges to "compar[e] what *they* consider comparable," thereby providing an excellent opportunity to accept the "invitation to imposition of subjective values." *Harmelin*, 501 U.S. at 986, 988 (Scalia, J., joined by the Chief Justice) (emphasis in original).

For example, "a State ha[ving] the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., joined by O'Connor and Souter, JJ.) (citing *Rummel*, 445 U.S. at 281). Indeed, it might be that other States are to be faulted for being too lenient. *See Howard v. Fleming*, 191 U.S. 126, 135–136 (1903) ("That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one"). Yet

Ewing goes to great lengths (Br. 43–53) to demonstrate that his sentence is, in fact, the most severe punishment imposed in the country. The Ninth Circuit did the same in *Andrade*. 270 F.3d at 766 ("Andrade could not have received such a severe sentence anywhere else, with the possible exception of Louisiana"). Ewing's and the Ninth Circuit's analyses are outcome-based and flawed.

First, Ewing discounts the relevance of other state statutes authorizing similar sentences if the equivalent punishment was not mandatory, but simply at the top of the statutory range. For example, according to Ewing (Br. 51), Alabama's habitual offender statute is not as severe because "Alabama would not require a court to sentence Mr. Ewing to life imprisonment" but would provide "the option . . . to sentence a defendant to either life imprisonment or a term of not less than twenty years." Logic dictates, however, that if a comparison is to be helpful at all, the maximum punishment authorized for the crime at issue is the only relevant consideration. If the goal is to seek "objective" evidence of what other States consider appropriate punishment for a particular crime, it makes no sense to ignore a sentence deemed to be appropriate. Cf., e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (stating that "first among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives") (citations and internal quotations omitted).

In other words, in Alabama, a life sentence is within the statutory sentencing range for a recidivist with a criminal history like that of Ewing's. That Alabama does not declare life imprisonment to be the

only available punishment does not change the fact that Alabama has deemed a life sentence to be appropriate and, therefore, not "grossly disproportionate" to the offense.

Second, in declaring that California's sentencing scheme is the "most severe" because other States allow for discretion, Ewing demonstrates the subjectivity that necessarily invades an interstate comparison. For example, Ewing acknowledges that in Vermont he "could have been sentenced to up to life imprisonment under the state's recidivist statute," (Br. 52) but declares Vermont's statute less severe because such a sentence would not "have been mandatory."[5] Taking this "would have/could have" reasoning even further, the Ninth Circuit, in *Andrade*, declared Louisiana's recidivist system less severe than California's on the basis that "there is a distinct possibility, unlike in California, that a Louisiana court might have invalidated such a sentence as excessive under its state constitution." 270 F.3d at 765. Comparisons and distinctions of mere possibilities are irreconcilable with *Solem*'s directive that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria." *Solem*, 463 U.S. at 292. A lesser sentence that might be imposed in another State — as opposed the maximum sentence authorized by law in that State — is no basis for meaningful comparison.

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[5] See also pp. 51-52 of Ewing's brief, in which he discounts the relevance of South Dakota's scheme because, "while Mr. Ewing would have been subject to a sentence of up to life imprisonment, there would be no mandatory term."

Nevada's recidivism statute would have permitted Ewing to be sentenced to life without parole (Br. 52) — a sentence harsher than the one he received. Nevertheless, Ewing declares California's system more severe (Br. 52) because, in Nevada, "a life sentence without parole is not mandatory, but rather discretionary," and "[a] Nevada court [may] alternately impose a sentence of life *with* possibility of parole." In conducting his "objective" interstate analysis, Ewing ignores the discretionary aspects of California's Three Strikes law, such as the fact that a judge in California has the discretion to strike prior felonies from consideration. *People v. Romero*, 917 P.2d 628, 647 (Cal. 1996) ("section 1385(a) does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law"). Presumably, had he been sentenced in Nevada, Ewing would alter his rankings and declare Nevada "most severe" by noting that, in California, he might not have been treated as a recidivist at all.

Likewise, that other States provide for parole does not supply the objective criterion deemed necessary for proportionality review. For example, Ewing acknowledges (Br. 53) that in "five other states [he] would be subject . . . to a discretionary life term." He contends that "the severity of such a sentence in those states is significantly mitigated by the availability of early parole or probation." Admittedly, in upholding the life sentence imposed in *Rummel*, this Court noted that, due to the possibility of parole, "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." 445 U.S. at 280–81. This Court did not, however, "rely simply on the existence of some system of parole. Rather, it looked to

the provisions of the system presented, including the fact that Texas had 'a relatively liberal policy of granting "good time" credits to its prisoners . . . .'" *Solem*, 463 U.S. at 301 (quoting *Rummel*, 445 U.S. at 280).

Ewing, by contrast, does not provide any information regarding the parole systems relied upon to support his conclusion. Instead, he points "simply [to] the existence of some system of parole." *Solem*, 463 U.S. at 301. If parole eligibility is to be considered in comparing the severity of sentences, the chance of receiving parole under a particular system is a relevant and necessary consideration. The injection of parole eligibility also begs the question: If Ewing's twenty-five-year-sentence without possibility of parole is unconstitutionally disproportionate, does a life sentence with the possibility of parole — imposed for the same crime in another jurisdiction — become unconstitutional should parole not be granted within twenty-five years?

Finally, even if California has imposed a more severe punishment than Ewing would have received elsewhere, this Court has made it clear that such a distinction "does not by itself render the punishment grossly disproportionate." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., joined by O'Connor and Souter, JJ.) (citing *Rummel*, 445 U.S. at 281). Assuming that an objective ranking could be reached, striking down the "most severe" punishment would simply result in the "runner-up" becoming immediately and accurately susceptible to the same charge. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular

offenders more severely than any other state." *Rummel*, 445 U.S. at 282 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). If California is that State for purposes of punishing recidivism, it may be due to unique concerns that warrant such a distinction. Indeed, "California is the most populous state, with the largest problem of crime and recidivism" (Brief of Petitioner in *Lockyer v. Andrade*, No. 01-1127, at 23). "Since the adoption of three-strikes, [it] has experienced a forty-one percent drop in its crime rate, whereas the rest of the nation experienced a nineteen percent drop." *Id.* See also *Howard v. Fleming*, 191 U.S. 126, 136 (1903) ("If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned").

C. The second-stage, three-part, intra/interjurisdictional analysis of *Solem v. Helm* is flawed and should be discarded.

The practical problems identified above in conducting an intra/interjurisdictional analysis of Ewing's sentence point to a deeper theoretical flaw in the premises of *Solem v. Helm*. Whatever their differences, *Rummel*, *Solem*, and *Harmelin* all recognize "the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as . . . the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290; see also *Rummel*, 445 U.S. at 274 ("one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative"); *Harmelin*,

501 U.S. at 989 (Scalia, J., joined by the Chief Justice) (sentencing determinations depend upon the "objective of criminal punishment (which is an eminently legislative judgment)"); *id.* at 998 (Kennedy, J., joined by O'Connor and Souter, JJ.) ("the responsibility for making these fundamental choices [involved in any sentencing system] and implementing them lies with the legislature") (citing *Gore v. United States*, 357 U.S. 386, 393 (1958)). Indeed, three of the "common principles" identified by Justice Kennedy in *Harmelin* — "the primacy of the legislature, the variety of legitimate penological schemes, [and] the nature of our federal system" — each require deference to legislative judgment on matters of criminal sentencing. 501 U.S. at 1001.

Defining criminal offenses and their respective sanctions necessarily requires a balancing of various penological goals such as retribution, deterrence, incapacitation, and rehabilitation. The amount of weight placed upon these goals may vary not only with the passage of time, as society's viewpoints regarding the purpose of the penal system change, but also with the nature of the crime and, in the case of recidivist statutes, with the type of offender.

For example, if deterrence were the only goal at issue regarding a certain offense, it would seem logical to punish that offense as severely as the law will allow. If, on the other hand, the goal were rehabilitation, the sentencing scheme would likely provide more flexibility and include opportunities, such as parole and probation, for an offender to demonstrate his or her reformation. Certain crimes, such as murder, may be deemed to warrant severe sentences based primarily upon the concerns of deterrence and retribution, rather

than an offender's possible receptiveness to rehabilitation. Indeed, some crimes — those deemed to warrant the death penalty — are punished solely on the basis of deterrence, retribution, and incapacitation. No consideration at all is given to whether the perpetrator might be receptive to efforts at rehabilitation.

Differences existing between the States' sentencing schemes may be a result of differing philosophies, values, unique problems with specific crimes, or crime rates. *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., joined by O'Connor and Souter, JJ.) ("State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise"). A State with an already low crime rate may not place as much weight upon deterrence as would a State seeking primarily to lower its crime rate. Whatever the reasons, it is clear that "[t]he federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Harmelin*, 501 U.S. at 999 (Kennedy, J., joined by O'Connor and Souter, JJ.) (comparing *Mistretta v. United States*, 488 U.S. 361, 363–366 (1989), with *Williams v. New York*, 337 U.S. 241, 248 (1949)). Because criminal sentencing determinations are directly related to these various penological goals, "[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system." *Id.*

For these reasons, it is difficult to conduct proportionality review of criminal punishments by way of a comparative analysis. "While there are relatively

clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are 'cruel and unusual,' proportionality does not lend itself to such an analysis." *Harmelin*, 501 U.S. at 985 (Scalia, J., joined by the Chief Justice). Although one can likely always find differences between punishments imposed for "similarly grave" crimes — assuming an agreement can be reached on the question of which crimes are "similarly grave" — "there are many justifications for [the] difference[s]." *Id.*, at 988–89 (Scalia, J., joined by the Chief Justice). One such justification is the states' interest in "inflicting severer punishment upon old offenders." *Graham*, 224 U.S. at 623; see also, e.g., *Parke*, 506 U.S. at 27 ("States have a valid interest in deterring and segregating habitual criminals") (citing *Rummel*, 445 U.S. at 284).

In other words, imposing a sentence that emphasizes opportunities for rehabilitation makes less sense when the offender has demonstrated that he or she is not a viable candidate for rehabilitation. The prospect of rehabilitation weighs less heavily in the balance when an individual has demonstrated — through repetitive criminal behavior — that any such efforts would likely be futile. In such cases, a legislative body may reasonably decide to place more weight upon the goals of deterrence and incapacitation. *Rummel*, 445 U.S. at 263 ("Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State"). The State of California has done just this through its "Three Strikes Law," reasonably placing more weight upon deterrence and incapacitation in cases in which an individual, having "been both graphically informed of the consequences of

lawlessness and given an opportunity to reform, . . . commits yet another felony." *Rummel*, 445 U.S. at 278. Its judgment should not be overturned lightly.

CONCLUSION

The ruling of the California Court of Appeal should be affirmed.

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July 31, 2002

No. 01-6978

Supreme Court, U.S.
FILED
JUL 31 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GARY A. EWING,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION; SECRETARY OF STATE BILL JONES; SENATORS DICK ACKERMAN, JIM BATTIN, JIM COSTA, RAY HAYNES, ROSS JOHNSON, WILLIAM J. "PETE" KNIGHT, TOM McCLINTOCK, BRUCE McPHERSON, CHARLES POOCHIGIAN; ASSEMBLYMEMBERS PATRICIA BATES, MIKE BRIGGS, DAVE COGDILL, DENNIS HOLLINGSWORTH, LYNNE LEACH, TIM LESLIE, DENNIS MOUNTJOY, ROBERT PACHECO, ANTHONY PESCETTI, GEORGE RUNNER, MARK WYLAND, PHIL WYMAN; AND FORMER ASSEMBLYMEMBER KEITH OLBERG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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21 pp

QUESTION PRESENTED

Does a sentence of 25 years to life for felony grand theft with several prior convictions for serious and violent felonies violate the Eighth Amendment in light of the highly deferential standard for reviewing prison sentences under that provision?

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IN THE

Supreme Court of the United States

GARY A. EWING,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment. CJLF has been joined by Bill Jones, California's Secretary of State, who was an author of the three strikes initiative. The brief is also joined by a bipartisan group of California legislators—Senators Dick Ackerman, Jim Battin, Jim Costa, Ray Haynes, Ross Johnson, William J. "Pete" Knight, Tom McClintock, Bruce McPherson,

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Charles Poochigian; Assemblymembers Patricia Bates, Mike Briggs, Dave Cogdill, Dennis Hollingsworth, Lynne Leach, Tim Leslie, Dennis Mountjoy, Robert Pacheco, Anthony Pescetti, George Runner, Mark Wyland, Phil Wyman; and Former Assemblymember Keith Olberg.

California's three strikes law is an important tool to combat the threat to public safety posed by repeat offenders. Thwarting this provision through an overly expansive interpretation of the Eighth Amendment would be contrary to the interests of victims and society that the CJLF was formed to protect. This is also contrary to the interests of those who enacted the law, as represented by one of its authors, Secretary of State Jones. This is also contrary to the aforementioned legislators, the elected representatives of the people, who best represent the will and moral values of the people of California.

SUMMARY OF FACTS AND CASE

In March 2000, the defendant entered the golf shop at the El Segundo Golf Course in Los Angeles County, California. App. to Pet. for Cert. 25. He was caught in the parking lot with three Calloway golf clubs in his pants, which were valued at $399 each, for a total theft of $1197. See App. to Pet. for Cert. 25.

A jury found the defendant guilty of grand theft. See App. to Pet. for Cert. 23. The defendant "has a lengthy criminal record dating back to 1984, with numerous misdemeanor and felony convictions." App. to Pet. for Cert. 28. In 1993 he was convicted of first-degree robbery and three separate burglary convictions. App. to Pet. for Cert 24. His record also includes convictions for theft, battery, and possession of a firearm convictions. See App. to Pet. for Cert. 28. He has suffered nine prior felony and misdemeanor convictions before his 1993 convictions. See App. to Pet. for Cert. 25. "Two of his prior strike offenses were violent and involved the use of a weapon." See App. to Pet. for Cert. 25. Between 1988 and the date of the current offense, the defendant had been either in prison, on probation, or on parole. See App. to Pet. for Cert. 28.

The defendant was sentenced to 25 years to life under California's three strikes law. See App. to Pet. for Cert. 25; Cal. Penal Code § 1170.12. The trial court denied the defendant's motion to reduce the grand theft conviction to a misdemeanor, see App. to Pet. for Cert. 24-25; *People* v. *Superior Court* (*Alvarez*), 14 Cal. 4th 968, 974-975, 979, 928 P. 2d 1171, 1174, 1177-1178 (1997) (discretion to reduce alternate misdemeanor/felonies to misdemeanors), and denied his motion to strike one or more of his prior serious felony convictions. See App. to Pet. for Cert. 24-25; *People* v. *Superior Court* (*Romero*), 13 Cal. 4th 497, 529-530, 917 P. 2d 628, 647-648 (1996) (discretion to "strike" priors). The state appellate court affirmed the conviction and sentence in an unpublished decision. App. to Pet. for Cert. 24. It rejected the defendant's state and federal constitutional attacks on the proportionality of his sentence, finding the sentence proportional to his crime and criminal history, and similar to sentences meted out to other California offenders. See App. to Pet. for Cert. 29.

On April 1, 2002, this Court granted the defendant's petition for certiorari.

SUMMARY OF ARGUMENT

Any regulation of the state's power to impose prison sentences implicates the most important state function—protecting public safety through the criminal law. Since crime prevention is primarily a function of the states, aggressive judicial review of prison sentences conflicts with federalism. Because fixing punishments for crime is primarily a legislative power, Congress also has an important interest in being free to set the sentences it deems appropriate. The freedom traditionally accorded to legislatures in sentencing has allowed for considerable innovation in this field. As judicial scrutiny potentially conflicts with these vital interests, any standard

governing Eighth Amendment challenges to the proportionality of prison sentences must be very deferential.

In spite of the efforts in Justice Kennedy's concurrence in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), there are still conflicts between *Solem* v. *Helm*, 463 U. S. 277 (1983) and *Rummel* v. *Estelle*, 445 U. S. 263 (1980) that need to be resolved. The two opinions differ on the deference accorded to the legislature's sentencing philosophy. *Rummel* is highly deferential while *Solem* in part justified the decision to strike down the sentence due to its incompatibility with rehabilitation. *Rummel* provides the better choice, as it is more consistent with the tradition of deferring to legislative policy choices.

The two cases may also differ on the respect accorded to the interest in punishing recidivists. While *Rummel* recognized and relied on this interest, some language in *Solem* indicated that the current crime deserved more focus than the defendant's criminal record. Again, *Rummel* provides the correct approach, as a sentence under a recidivist scheme can only be fairly analyzed in the context of the defendant's criminal record. The defendant's attempts to invoke *Solem* to circumvent consequences of his record should not be accepted. The second and third parts of *Solem*'s three-part test were explicitly rejected in *Rummel*. If a comparison of the defendant's deserts and the harshness of the penalty creates an inference of gross disproportionality, then the other two factors are unnecessary. The fact that other punishments are similarly severe will not save such a sentence. The other two *Solem* factors could only exert an influence in close cases, but in these cases the state should be given the benefit of the doubt. At the very least, courts should be warned about the problems of relying on factors other than comparing desert and punishment, as inexact as that may be.

In light of Ewing's lengthy criminal record, his sentence is not grossly disproportionate. California's three strikes law plays an important role in reducing crime through deterring or incapacitating chronic offenders. Common sense says that

those who continue to offend should be subject to lengthy sentences in order to protect society. Numerous studies show that a relatively small number of offenders are responsible for a very disproportionately large share of crime, and that past criminal behavior is an excellent predictor of future crime. Unsurprisingly, there is evidence to show that three strikes may have contributed to California's dramatic drop in crime since the implementation of the law. While California does not have the burden of proving three strike's efficacy, this does place the defendant's sentence in its appropriate context.

Any doubts about the constitutionality of the defendant's sentence are resolved by his record. Residential burglary is a serious crime which carries a real risk of violence and can substantially traumatize its victims. Robbery is a violent felony which was not present in either *Solem* or *Rummel*. Since Ewing's record is far worse than what confronted the *Solem* or *Rummel* courts, his sentence is constitutional.

ARGUMENT

I. Any standard governing Eighth Amendment challenges to the proportionality of prison sentences must be very deferential.

" 'The most basic function of government' " is " 'to provide for the security of the individual and of his property.' " *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (White, J., dissenting)). Punishing crime is integral to any crime prevention scheme, by preventing individuals from doing what society deems undesirable. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, p. 30 (1986). "The law threatens certain pains if you do certain things, intending thereby to give you a motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may be continued to be believed."

O. Holmes, The Common Law 40 (M. Howe ed. 1963). Without punishment there is no criminal law.

While the Eighth Amendment does limit the state's power to punish, see *Austin* v. *United States*, 509 U. S. 602, 609 (1993), it is applied sparingly to prison sentences. See, *e.g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 1001 (1991) (Kennedy, J., concurring)[2]; *Solem* v. *Helm*, 463 U. S. 277, 289-290 (1983). Thus there is a tradition of deference to the sentencing choices made by legislatures in noncapital cases. See *Harmelin*, *supra*, at 998 (Kennedy, J., concurring); *Solem*, *supra*, at 290; *Rummel* v. *Estelle*, 445 U. S. 263, 274 (1980). There are strong constitutional and jurisprudential reasons for this deference.

Aggressive federal constitutional review of prison sentences conflicts with federalism. Crime prevention is primarily a function of the states, rather than the federal government. See *Patterson* v. *New York*, 432 U. S. 197, 201 (1977). "Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States." *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991). Constitutional review of prison sentences must take into account that the courts are being asked to intrude upon these vital state interests.

Similarly, Congress has important interests in federal sentencing law. Although sentencing is not the exclusive prerogative of any one branch of the federal government, "Congress, of course, has the power to fix the sentence for a federal crime, [citation], and the scope of judicial discretion with respect to a sentence is subject to congressional control." *Mistretta* v. *United States*, 488 U. S. 361, 364 (1989). When Congress speaks, the courts follow unless the Constitution compels otherwise.

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2. See *infra*, at 15, n. 4.

Until now, sentencing law has seen tremendous innovation. The traditional approach of allowing sentencing judges considerable discretion within the statutory range has been replaced in many jurisdictions by a variety of approaches such as sentencing guidelines, presumptive sentencing, and mandatory minimum sentences. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.3(b), pp. 734-735 (2d ed. 1999). Profound disappointment with rehabilitation as a sentencing philosophy, see E. van den Haag, Punishing Criminals 188-189 (1991), has led to a resurgence of incapacitation or retribution-based approaches to sentencing. In most jurisdictions, sentencing is now very different from what it was not too long ago.

California's three strikes law is an important part of this ongoing reform. It protects the public from career criminals by incapacitating or deterring chronic offenders through lengthy sentences. See part III A, *infra*, at 19. Twenty-four states and the federal government now have some form of "three strikes" law. See Clark, Austin, & Henry, "Three Strikes and You're Out": A Review of State Legislation, NIJ Research in Brief, p. 1 (Sept. 1997). As is expected in our federal system, there is considerable variation in these laws. See *id.*, at 7-9. A successful assault on even a part of California's statute threatens these laws and inhibits future reforms. The important federalism interests in sentencing law reinforce the need for an appropriately deferential standard.

II. The conflicts between *Solem* and *Rummel* should be resolved by extending the deference accorded to punishment measures.

There are "tensions" between *Solem* v. *Helm*, 463 U. S. 277 (1983) and *Rummel* v. *Estelle*, 445 U. S. 263 (1980). See *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (Kennedy, J., concurring). This conflict and *Harmelin*'s divided opinion have left considerable confusion in the courts over the Eighth Amendment's proportionality guarantee. See Brief for Crimi-

nal Justice Legal Foundation, et al. as *Amici Curiae* in *Lockyer* v. *Andrade*, No. 01-1127, pp. 15-19 (available from http://www.cjlf.org/pdf/Andrade.pdf) ("CJLF Andrade Brief"). Further resolution is needed.

Justice Kennedy's concurrence in *Harmelin* sought to resolve the conflicts by identifying common principles in the proportionality cases. See 501 U. S., at 998. These principles reinforce the tradition of deference, and move the balance toward *Rummel* and away from *Solem*. See CJLF Andrade Brief, at 12-15. This case provides the Court with an opportunity to continue this trend, while further clarifying proportionality review of prison sentences. A majority opinion that expands upon Justice Kennedy's *Harmelin* concurrence can do much to settle the law.

A. Philosophy.

Deference is more than being lenient to the state when comparing the severity of the punishment to the defendant's desert. An important component of an appropriate interpretation of the Eighth Amendment is nearly total deference to the sentencing philosophy behind the government's choice of sanctions. Any sentence can have a variety of motivations. Prevention, restraint, rehabilitation, deterrence, education and retribution can all play a part in a state's sentencing philosophy. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 30-36 (1986). The exact mix between these and other rationales involves policy choices that are inappropriate subjects for judicial review.

Rummel, *supra*, reflects this principle. The *Rummel* Court was unwilling to extend the Eighth Amendment's proscription much beyond the uniquely cruel and unusual *cadena temporal* of *Weems* v. *United States*, 217 U. S. 349 (1910), out of deference to policy choices behind any sentencing scheme. "But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with

the view expressed in *Coker* [v. *Georgia*, 433 U. S. 584 (1977)] that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." *Rummel*, 445 U. S., at 275.

The *Rummel* Court gives form to this deference in its treatment of Texas' recidivist scheme. Rummel's life sentence was not based upon his comparatively minor crime of the theft of $120.75 by false pretenses, but due to his long criminal record. See *id.*, at 266. This Court completely accepted the recidivist rationale justifying *Rummel*'s long sentence.

> "This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Id.*, at 284-285.

Some language in *Solem*, *supra*, is difficult to reconcile with these principles. The decision did recognize that courts should pay considerable deference to any legislative determination of the appropriate range of sentences. See 463 U. S., at 290. However, other language in *Solem* implies more exacting review than this Court held was proper in *Rummel*. Helm was sentenced to life without possibility of parole under a recidivist sentencing statute. See *id.*, at 281-282. He had six prior nonviolent felony convictions, including three for third-degree burglary. See *id.*, at 279-280. His current conviction was for uttering a "no account" check for $100. *Id.*, at 281.

One reason given by the *Solem* Court for overturning Helm's sentence was that it foreclosed any possibility of his rehabilitation.

> "Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation." *Id.*, at 297, n. 22.

While the *Solem* decision recognized that South Dakota had an interest in punishing recidivists more severely, see *id.*, at 296, unlike *Rummel*, it did not mention the state's incapacitation interest. The incapacitation theory of punishment is the common sense view that prison keeps criminals from continuing to commit crimes. See J. Wilson, Thinking About Crime 193-194 (1977). Some argue that rehabilitation must be coupled with incapacitation "as the vast majority of prisoners will ultimately be returned to society." See 1 LaFave & Scott, *supra*, § 1.5(a)(2), at 32. Others recognize that some criminals pose too high a risk to justify extensive efforts at rehabilitation.

When an individual repeatedly demonstrates an inability to conform to the law, it is no more than common sense to question whether that person will ever conform to the law. Those repeat offenders who continue their habits outside of prison pose a significantly greater threat to society than the occasional lawbreaker. Significant or even lifetime imprisonment is the one sure way to protect society. "If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates." Wilson, *supra*, at 194.

The proper mix of incapacitation and rehabilitation is a policy question that the *Rummel* Court left to the legislatures. *Solem*'s intrusion into such disputes is unwarranted and should not continue. Justice Kennedy's *Harmelin* concurrence

demonstrated a deference to the policy choices behind a sentence similar to *Rummel*'s. See *Harmelin*, 501 U. S., at 1007 ("In asserting the constitutionality of this mandatory sentence, I offer no judgment on its wisdom"). This provides an appropriate starting point for this case.

B. Recidivism.

The defendant utilizes another potential conflict between *Rummel* and *Solem* in order to circumvent the deferential proportionality standard in the context of recidivist sentencing. The *Solem* Court made the following remarks when comparing the gravity of Helm's punishment with his culpability. "We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision." 463 U. S., at 296, n. 21.

The defense invokes this passage to split the analysis of Ewing's desert and punishment. It first compares Ewing's principle offense, grand theft, with his 25 years to life sentence and unsurprisingly finds an inference of gross disproportionality. The defense then argues that Ewing's criminal career is relevant only after this initial finding, where the State is allowed to use his recidivism to "rebut the inference of gross disproportionality." See Brief for Petitioner, part II B 2.

This approach cannot be squared with the deferential standard announced in *Rummel*, *Solem*, and the *Harmelin* concurrence. See *Harmelin*, 501 U. S., at 999 (Kennedy, J., concurring). The three strikes provision under which Ewing was sentenced is singularly focused on recidivism. As the preamble to the three strikes initiative states, "It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." See California Ballot Pamphlet, General Election, November 8, 1994, p. 64 (Proposi-

tion 184) (1994). The defense's analysis removes Ewing's sentence from its antirecidivist context and improperly shifts the burden of justification to the State.

The Constitution permits extraordinary increases in sentences based upon the defendant's prior criminal record. In California, a prior conviction of first- or second-degree murder is a special circumstance that elevates the penalty for first-degree murder from 25 years to life to life without possibility of parole or death. See Cal. Penal Code §§ 190(a), 190.2(a)(2). While 25 to life is a severe sentence, there is a qualitative difference between that and a death sentence that is constitutionally significant. See *Lankford* v. *Idaho*, 500 U. S. 110, 125, n. 21 (1991). Without this prior conviction a death sentence would be unconstitutional absent any other special circumstance. Cf. *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994) (must have at least one "aggravating factor" in order to be eligible for the death penalty). In this circumstance, like any other recidivist scheme, the sentence can only be analyzed in the context of the prior conviction. Examining the present conviction without looking at the criminal record which supports the sentence, tips the balance towards a finding of unconstitutionality.

Notwithstanding the footnote quoted above, *Solem* does not justify the loaded question asked by Ewing. It understood that "a State is justified in punishing a recidivist more severely than it punishes a first offender." *Solem*, 463 U. S., at 296. Recidivism "cannot be considered in the abstract" but rather is examined in light of the facts of the prior offenses. See *ibid.* *Solem* did not begin to answer whether the sentence was unconstitutionally disproportionate before examining Helm's record.

To the extent that *Solem* supports the defendant's approach, it is inconsistent with *Rummel*. "Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first 'petty property offense.' Having twice imprisoned him for felonies, Texas was entitled

to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." 445 U. S., at 284.

As *Rummel* recognized, a sentence that is enhanced due to recidivism can only be analyzed in the context of the defendant's criminal history. Any conflict between this and the dicta of *Solem*'s footnote 21 is best resolved in favor of *Rummel*. Ewing's approach subverts proportionality analysis of recidivist sentencing schemes, and thus should not stand.

C. Objective Factors.

There are other unresolved conflicts between *Solem* and *Rummel*. The *Solem* decision was derived from examining the sentence through three "objective" factors: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U. S., at 292. These last two factors contradict *Rummel*'s analysis.

The dissent in *Rummel* argued that the harshness of Rummel's sentence relative to the punishment for other crimes in Texas supported the unconstitutionality of his sentence. See 445 U. S., at 300-302 (Powell, J., dissenting). This is *Solem*'s second factor, and it was dismissed by the *Rummel* majority in a footnote. See *id.*, at 282-283, n. 27. The footnote correctly noted that any comparison with the punishment for different crimes within the state risked judicial second-guessing of legislative policy choices. "Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative." *Ibid.* All crimes will not be punished alike; ranking the severity of crimes is a matter of legislative policy. As Justice Frankfurter noted for this Court, "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U. S. 386, 393 (1958); accord *Rummel*, 445 U. S., at 282, n. 27.

The third *Solem* factor, a comparison with sentences for similar crimes in other jurisdictions, is also contrary to *Rummel*. The *Rummel* Court rejected the comparison in that case because recidivist statutes involved too many complex variables for any meaningful comparison. See *id.*, at 279-280. Any differences between recidivist schemes are "subtle rather than gross." *Id.*, at 279. Differences in parole policy and the exercise of prosecutorial discretion further complicate the inquiry. See *id.*, at 280-281.

The *Rummel* Court also raised a more fundamental objection to comparing the sentences of different jurisdictions. In a nation with 51 different sentencing laws,[3] there are bound to be different approaches to sentencing. Those sentences at the upper end of the spectrum are automatically suspect under *Solem*'s third factor. The leveling influence of this approach is inconsistent with the crucial federalism interest in allowing a state to punish crime in its own way. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating offenders more severely than any other State." *Rummel*, 445 U. S., at 282. Innovation is hampered if the most punitive statute is automatically suspect.

Rummel's analysis is superior to *Solem*'s on these points. The second and third *Solem* factors do not add anything meaningful to proportionality analysis of prison terms. If a sentence appears to be grossly disproportionate after comparing punishment and culpability, then any comparison to other punishments within or outside that state are irrelevant. The fact that others punish similarly will not convert an already disproportionate sentence into a constitutionally valid punishment.

The only substantive effect that the second and third *Solem* factors could have is in close cases, where the *Solem* factors

3. The number is even larger if we count other state-like, largely self-governing entities such as the District of Columbia, Guam, and the Virgin Islands.

could tip the balance. An appellate court reviewing a sentence should not make so subtle a distinction. See *Rummel*, 445 U. S., at 279. In close cases, courts should defer to legislatures and resolve any doubts in favor of the constitutionality of the sentence.

Justice Kennedy's *Harmelin* concurrence took a big step in this direction by holding that a sentence is constitutional absent an inference of gross disproportionality, thus bypassing the second and third *Solem* factors. See *Harmelin*, 501 U. S., at 1005 (Kennedy, J., concurring).[4] The concurrence finds that considering the last two *Solem* factors is "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Ibid.* This use of the *Solem* factors does no more than "*validate* an initial judgment that a sentence is grossly disproportionate to a crime." *Ibid.* (emphasis added). The last two *Solem* factors are analytical appendages, reinforcing a conclusion that the Court would still reach in their absence. This is evident from the two noncapital cases that applied these factors, *Solem* and *Weems* v. *United States*, 217 U. S. 349 (1910). See *Solem*, 463 U. S., at 290-292 (*Weems* applied the three factors utilized in *Solem*).

In *Weems*, the defendant was convicted of the crime of falsifying a public document. His crime was to have knowingly entered a single piece of false information in a public record "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it." See 217 U. S., at 365. The punishment for the offense was the infamous *cadena temporal*, which included 12 years at hard labor in chains and a form of intensive parole for life. See *id.*, at 366. No amount of comparison to other punishments within or outside the jurisdiction could save this penalty.

4. *Harmelin* was a split decision. Because Justice Kennedy's concurrence was the narrowest concurring opinion in *Harmelin*, it is the holding of the case. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

Such comparisons were also unnecessary in *Solem* even though it involved less egregious facts. Helm was convicted of uttering a "no account" check for $100, with six prior convictions. See 463 U. S., at 279-281. Because there was no record of the underlying facts of the prior convictions, see *id.*, at 280, Helms' culpability had to be assessed assuming that he committed the crimes in the least culpable manner covered by the relevant statutes. He had three prior third-degree burglary convictions, but a third-degree burglary in North Dakota "covered entering a building to steal a loaf of bread." *Id.*, at 297, n. 23. Helms' grand larceny conviction could be similarly minor. "It appears that the grand larceny statute would have covered the theft of a chicken." *Ibid.* His other two prior felonies were similarly trivial. There was no minimum amount for his theft by false pretenses conviction, see *id.*, at 280, n. 2, and his final prior felony, third-offense drunk driving, see *id.*, at 280, n. 4, is also minor.

When this long but apparently minor criminal record is compared to a sentence of life without possibility of parole for writing a $100 bad check, one can reasonably conclude that the punishment was grossly disproportionate to the crime. Analysis under the second and third *Solem* factors simply confirmed a conclusion that the Court would have made anyway.

While *stare decisis* is likely to keep the *Solem* factors available, it is important to clarify the potential dangers of these factors. Also, a comparison of culpability and the severity of punishment is the primary focus of proportionality analysis. Any inference of gross disproportionality must be substantial before proceeding to the *Solem* factors or any other objective measures of disproportionality. Courts should not use such factors to color their initial assessment of the punishment's proportionality.

Comparing culpability and the severity of the punishment is no panacea. Lacking other factors to focus the analysis, proportionality analysis is close to the "I know it when I see it" definition of obscenity. Cf. *Jacobellis* v. *Ohio*, 378 U. S. 184,

197 (1964) (Stewart, J., concurring). Unfortunately, proportionality analysis cannot aim much higher. "[A]ny judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *United States* v. *Bajakajian*, 524 U. S. 321, 336 (1998). Drawing constitutional lines between prison sentences is "troubling" at best. See *Solem*, 463 U. S., at 294.

"It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.' " *McCleskey* v. *Kemp*, 481 U. S. 279, 319 (1987) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 383 (1972) (Burger, C.J., dissenting)). Therefore findings of disproportionality must be "exceedingly rare." See *Rummel*, 445 U. S., at 272. Thus, reviewing courts must make every reasonable presumption in favor of the punishment's constitutionality. Any less deference risks substituting judicial philosophy for the legislature's. The conflicts between *Rummel* and *Solem* should be resolved under this principle.

III. Ewing's sentence is not grossly disproportionate to his culpability in light of his lengthy and serious criminal record.

Any assessment of the proportionality of Ewing's sentence must begin with his lengthy criminal record. California has a vital interest in punishing recidivists more severely than first-time offenders, and Ewing's record demonstrates that he is a dangerous career criminal. Because incapacitating the defendant is the only effective way to end his one-man crime wave, Ewing's sentence is not grossly disproportionate to his desert.

A. Recidivism, Incapacitation, and Deterrence.

Society must be allowed to punish repeat offenders more severely. Recidivist statutes are an attempt to diminish crime by concentrating resources on those who pose the greatest danger to society.

> "The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel* v. *Estelle*, 445 U. S. 263, 284 (1980).

Therefore, "recidivism . . . . —prior commission of a serious crime—is as typical a sentencing factor as one might imagine." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 230 (1998). This Court does not have to agree with the philosophy behind the three strikes law to uphold Ewing's sentence. See *Spencer* v. *Texas*, 385 U. S. 554, 568-569 (1967). However, an appreciation of the considerable analytical strength behind California's law reinforces the deference that should be paid to Ewing's sentence.

Recidivist statutes like the three strikes law are sensible. Increasing the penalty for subsequent crimes may deter some of those who were not deterred by the initial penalty. Those who are beyond deterrence and repeatedly commit crimes should be incapacitated for a lengthy time in order to protect society. Arguments to the contrary are counterintuitive. See Janiskee & Erler, Crime, Punishment, and *Romero*: An Analysis of the Case Against California's Three Strikes Law, 39 Duq. L. Rev. 43, 43 (2000).

Statistical evaluation of claims regarding criminal justice is inherently difficult. Data can be difficult to collect. The processing of individuals from suspects into convicted criminal is long and complex. Courts, police, and prosecutorial agencies

are not designed to generate easily collected and quantified data. Even when relevant figures are found, drawing conclusions can be difficult. For instance, it is difficult to separate cause from effect when examining the connection between crime rates and incarceration rates. "Increased incarceration is likely to reduce the amount of crime but there is also little question that increases in crime will translate into larger prison populations." Levitt, The Effect of Prison Overcrowding Litigation, 109 Q. J. Econ. 319, 322 (1996). This is known as "simultaneity bias." *Ibid.* It can also be very difficult to separate the many factors that can influence the crime rate such as weather, demographics, gang wars over the crack cocaine trade, changes in other laws, or changes in prosecutorial emphasis. Since the effects of the many variables cannot be easily separated, measuring the deterrent or incapacitation effect of the three strikes law or similar measures is imprecise at best.

However, there is still statistical support for three strikes' effect on reducing crime. The three strikes law took effect in March 1994. From 1995 to 1998 California's homicide rate declined at an annual rate of 13.36%. From 1992 through 1994 the rate of change for the homicide rate was increased by 1.57%. See Janiskee & Erler, 39 Duq. L. Rev., at 53, 69. These results are statistically significant at the 99.5% level of probability. See *id.*, at 53-54. The violent crime figures tell a similar story. Over the same periods, the violent crime index fell 8.66% annually in the post-three strikes period and, declined only .50% pre-three strikes. See *id.*, at 53. Once again, this was significant at a 99.5% level. See *ibid.* The pre-three strikes total crime rate fell 2.35%, but the post-three strikes total crime rate fell 8.39%. See *id.*, at 52, 67. Although the nationwide crime rate also fell during this period, California's rate fell much faster. See Jones, Why the Three Strikes Law is Working in California, 11 Stan. L. & Pol'y Rev. 23, 24 (1999).

Such figures cannot conclusively prove that three strikes reduces crime, but they do not have to since the state does not have the burden of proving the efficacy of its punishment. See *Rummel* v. *Estelle*, 445 U. S. 263, 285 (1980) (within the discretion of the punishing jurisdiction). These figures reinforce the conclusion that the state has a valid basis for believing that the sentence advances the goals of the criminal justice system in a substantial way, cf. *Solem* v. *Helm*, 463 U. S. 277, 297, n. 22 (1983), which is all that is necessary given the deference due to the legislature.

Three strikes also stands upon a solid theoretical foundation. Numerous studies have examined chronic offenders. "These studies consistently show that offender samples can be subdivided into a low-frequency category (comprised of a large number of 'occasional' offenders) versus a high-frequency category (comprised of a small number of chronic offenders)." R. Wright, In Defense of Prisons 108 (1994). The results are similar whether derived from studies of the arrest records of age-group cohorts, see *id.*, at 109-111 (summarizing studies), or from the self-reported offenses of prisoners. See *id.*, at 111-112 (summarizing research). The estimates may vary from 5% of a cohort being responsible for 75% of all felonies, see L. Shannon, Criminal Career Continuity 217 (1988), or 32% of all offenders being responsible for 82% of total crime index arrests, see M. Wolfgang, T. Thornberry, & R. Figlio, From Boy to Man, from Delinquency to Crime 201 (1987), but in every case a relative handful of offenders are responsible for much crime. Even among recidivists there are chronic offenders. A study of those rearrested within three years of leaving prison in 1994 found that while offenders with 35 or more arrests over their careers were only 12% of the sample, they were responsible for 34.4% of all arrests of recidivists, nearly triple their proportionate share. See Langan & Levin, Bureau of Justice Statistics, Recidivism of Prisoners in 1994, p. 5 (2002) (table 4).

Recidivism figures reflect this reality. The single best prediction of future criminality is a lengthy criminal history. Thus one study found that "after the third arrest there is an approximately 80 percent chance that subsequent arrests will follow." Wolfgang, Thornberry, & Figlio, *supra*, at 85. Similarly, the Bureau of Justice Statistics study found that while 40% of those with 1 prior arrest were arrested within three years of their release, 70.3% of those with 7-10 priors, 79.1% of those with 11-15 priors, and 82.1% of those with 16 or more priors were rearrested within three years of their release. See Langan & Levin, *supra*, at 10 (table 12). Another study tried to replicate the predictive powers of the three strikes law. It examined 73 Canadian offenders who would have qualified for the three strikes penalty and examined their criminal history after release. Under a conservative estimate that tracked only those who had committed the Canadian equivalent of three violent felonies under the three strikes law, the study found that less than one-third of these criminals did not commit any more violent offenses after their release from prison. See Burt, et al., Three Strikes and You're Out: An Investigation of False Positive Rates Using a Canadian Sample, 64 Fed. Probation 3, 4 (June 2000). This figure was considered a conservative estimate of the three strikes "false positive" rate, see *ibid.*, a figure it found distressingly high. See *id.*, at 5. However, since the study could only count those offenses for which the offenders were caught, the harm caused by these recidivists is likely to be much higher than the authors' estimate.

Any total even remotely close to this figure more than justifies the three strikes approach. A one-third "false positive" rate means two-thirds of the sample *did* commit one or more *violent* felonies after release. If someone has a long criminal history, stands convicted of a felony, and has even a 50% chance of subsequently committing a violent felony, then lengthy incarceration is not just acceptable, it is imperative. The Constitution allows states to punish or otherwise limit freedom on the basis of future dangerousness. See *United*

States v. *Salerno*, 481 U. S. 739, 748-749, 755 (1987); *Jurek* v. *Texas*, 428 U. S. 262, 274-275 (1976). Three strikes simply continues this trend, one that has been followed in various forms by Congress and 24 states. See Clark, Austin, & Henry, "Three Strikes and You're Out": A Review of State Legislation, NIJ Research in Brief, p. 1 (Sept. 1997).

There is also substantial anecdotal support for the initiative. In the three years following the initiative there was a substantial exodus of parolees. See Ardaiz, California's Three Strikes Law: History, Expectations, Consequences, 32 McGeorge L. Rev. 1, 29 (2000); see also Janiskee & Erler, *supra*, 39 Duq. L. Rev., at 45-46. "Gregory Gaines, a two-strike parolee from Folsom Prison remarked upon his release that 'a lot of people' at Folsom are frightened by the Three Strikes law. Gaines said, 'I've flipped 100 percent, it's a brand new me, mainly because of the law. It's going to keep me working, keep my attitude adjusted.' " Janiskee & Erler, 39 Duq. L. Rev., at 45. The District Attorney for Kern County, California, "related that 'I go to prisons and do classes for inmates on "three strikes." There is no other topic of conversation within institutions other than the impact of this statute. "Am I a two-striker? Am I three-striker? What if you've got one of these, is that a strike?" And they're intently interested in it. Many of them are talking about moving out of the state.' " *Id.*, at 46.

There are reports that are critical of three strikes' impact on crime. See, *e.g.*, F. Zimring, S. Kamin, & G. Hawkins, Crime & Punishment in California: The Impact of Three Strikes and You're Out (1999); Beres & Griffith, Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report, 32 Loy. L.A. L. Rev. 101 (1998), but they do not prove the case against three strikes. The Zimring study is crippled by severely flawed methodology, such as examining arrest rates so soon after the initiative went into effect. This meant that many of the arrests examined in the study had to be for crimes committed before the three strikes law. See Janiskee & Erler, 39 Duq. L. Rev., at 46-51 (listing

criticisms). Analyzing crime rates for the first few years of the initiative cannot measure three strikes incapacitative effect because those serving sentences during this period would still be in prison even without the three strikes enhancement. Any incapacitative effect will be measured over time as three strikes starts to extend the sentences. Cf. Kessler & Levitt, Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation, 42 J. L. & Econ. 343, 359 (1999) (describing this effect with respect to sentence enhancements under California's Proposition 8). The Beres and Thompson article is only a "not proven" verdict on three strikes, concluding that "there is no evidence that Three Strikes played an important role in the drop in the crime rate." 32 Loy. L.A. L. Rev., at 102. This conclusion, if true, but see *supra*, at 19, has limited relevance to the Eighth Amendment debate. A state does not have to prove the efficacy of any punitive measure, let alone undertake the prohibitively difficult task of showing that any single measure was by itself responsible for a staggering drop in the crime rate.

Three strikes was a controversial measure within the academic community, and amicus will not try to address every article or study hostile to the measure. "The underlying assumption of this [Zimring's] study—and all similar statistical studies—is that the abstract world of probability is more reliable as a basis for public policy than experience and common sense. It is as if some pre-Socratic philosopher—perhaps Heraclitus— were to put forth the paradox that probability is Being." Janiskee & Erler, 39 Duq. L. Rev., at 43 (footnote omitted). Data, theory, and experience all support the common sense idea behind three strikes, that hardcore recidivist felons should be punished much more severely when they continue to commit felonies.

The three strikes law is part of a long tradition of recidivist laws. The individual states and Congress will differ on how to define and punish recidivists, but that is their right. "Like the line dividing felony theft from petty larceny, the point at which

a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Rummel*, 445 U. S., at 285. California has made that choice and it had good reasons for doing so. A look at the facts of Ewing's case demonstrates the wisdom of the decision.

B. The Proper Sentence.

Ewing's case is not one of the "exceedingly rare" examples of a grossly disproportionate prison sentence. Cf. *Rummel*, 445 U. S., at 272. His criminal career is long, varied, and serious. Before his current felony conviction, the defendant had suffered a first-degree robbery conviction, and three separate residential burglary convictions. See App. to Pet. for Cert. 24. He had "suffered nine convictions, some of which were misdemeanors from 1988 through 1993 when he was imprisoned for the robbery and burglary offenses." See App. to Pet. for Cert. 25. His current offense was committed nine months after his release from prison for the robbery and burglary offenses. See App. to Pet. for Cert. 25.

Ewing is a one-man crime wave—he cannot or will not stop offending. Parole and probation seem to have no effect on him, and he was not deterred by his prison sentences. He is a chronic offender who has left society no alternative but to incapacitate him in order to protect itself.

The propriety of Ewing's sentence is reinforced by the facts of this Court's more recent proportionality cases. Ewing's sentence compares favorably to either of the recidivist cases, *Rummel* and *Solem*. *Solem*, the only modern case to strike down a prison sentence on Eighth Amendment grounds, involved a longer sentence for a less culpable defendant. Although Ewing's sentence is long, 25 years to life is still less than Helm's life without possibility of parole. See 463 U. S., at 279. Ewing's current crime, grand theft, is also more severe

than the crime for which Helm was sentenced to life, "uttering a 'no account' check for $100." *Id.*, at 281.

More importantly, Ewing's criminal record is much more severe than Helm's. Although Helm's prior felonies outnumbered Ewing's by six to four, Ewing's are considerably more severe. Unlike Helm's comparatively minor third-degree burglary convictions, see *ante*, at 16, Ewing's burglaries are residential. See App. to Pet. for Cert., at 24.[5] Residential burglary is a much more serious matter than the third-degree, commercial burglary of *Solem*.

The common law had considered burglary to be a very serious offense because of the "abundant terror" of the crime, and the high risk of violence if the burglar is caught in the act by the occupants. See 4 W. Blackstone, Commentaries 223 (1st ed. 1769). At common law, burglary was limited to residential entries at night. See *id.*, at 224-225. While the three strikes law does not distinguish between day and night residential burglaries, this crime still causes significantly more harm, and carries much more danger than the third-degree burglaries of *Solem*.

California courts have consistently recognized that public safety, not protection from trespass or theft, is the essential rationale for its burglary laws.

> "Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germi-

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5. Only residential burglaries qualify as prior "strikes" under the three strikes law. See Cal. Penal Code §§ 1170.12(b)(1), 1192.7(c)(18) (first degree), 460(a) (first degree=residential).

nation of a situation dangerous to personal safety." *People* v. *Gauze*, 15 Cal. 3d 709, 715, 542 P. 2d 1365, 1368 (1975) (internal quotations omitted); accord *People* v. *Montoya*, 7 Cal. 4th 1027, 1042, 874 P. 2d 903, 911-912 (1994).

Burglary is serious because it takes advantage of our sense of security in our home. See Ardaiz, 32 McGeorge L. Rev., at 18. "It is not just entry into a residence to commit theft. It includes entry to commit assault, rape, robbery, or any number of other felonies. Just ask anybody who has been burglarized whether they have a greater or lesser sense of security after the crime. Ask them whether they continued to feel safe in their home." *Ibid.*

Some victims were asked. A survey of English burglary victims found that "65 per cent of the victims interviewed 4 to 10 weeks after the event said it was still having some effect on their lives." Maguire, The Impact of Burglary Upon Victims, 20 Brit. J. Criminology 261, 264 (1980). The lingering effects were most commonly "a general feeling of unease or insecurity and a tendency to keep thinking about the burglary." *Ibid.* Women were more vulnerable, being more likely to have strongly adverse reactions than men. See *id.*, at 263. A burglary victim "frequently engages in interactions where a consistent theme is voiced: people, especially kids, can't be trusted, and a victim can't expect much help from law enforcement or from insurance companies. Stated in an extreme form, it is a threatening world over which one has little control." Paap, Being Burglarized: An Account of Victimization, 6 Victimology 297, 301 (1981).

Burglary is also a very difficult crime to solve. In 2000, only 13.9% of burglaries known to police were cleared by arrests, as opposed to rates of 56.9% for aggravated assault or 63.1% for murder and "nonnegligent" manslaughter. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2001, p. 383 (2002) (Table 4.19). When combined with the considerable distress that comes from

being burglarized, victims are understandably frustrated. See Hawkins, Evaluating the Residential Burglary Victim's Attitude Toward Police, 52 The Police Chief 33, 33 (Dec. 1986). This can only decrease public support for law enforcement. See *id.*, at 33-34. While improved victim relations can alleviate some of this, see *id.*, at 34, burglary still harms the public's perception of law enforcement. When such an invasive crime is so rarely solved, the perception of public safety is rightly diminished.

Burglary is also deemed a violent felony under § 1402 of subtitle I of the Armed Career Criminal Act of 1986. See 18 U. S. C. § 924; *Taylor* v. *United States*, 495 U. S. 575, 578 (1990). This statute provides a sentence enhancement of a defendant convicted of unlawfully possessing a firearm, see 18 U. S. C. § 922(g), who has three or more prior convictions for "a violent felony or a serious drug offense . . . ." See 18 U. S. C. § 924(e)(1). "Violent felony" specifically includes burglary. *Id.*, subd. (e)(1)(B)(ii). In *Taylor*, the defendant claimed that his two prior convictions for second-degree burglary under Missouri law should not count as violent felonies "because they did not involve 'conduct that presents a serious potential risk of physical injury to another,' under § 924(e)(2)(B)(ii)." 495 U. S., at 579. Because the statute did not define burglary, the Court had to ascertain what Congress meant for that term to cover. See *id.*, at 580.

After reviewing the history of the statute and its predecessor, see *id.*, at 581-587, this Court came to several conclusions. "First, . . . Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.*, at 587-588. Congress appreciated the risk of a violent confrontation caused by the burglar's intrusion. See *id.*, at 588. Congress thus concluded that those burglaries "punishable by imprisonment for more than a year constituted a category of crimes that shared this potential for violence and that were

likely to be committed by career criminals." *Ibid.* Therefore, the Court rejected petitioner's contention that Congress only included a subclass of burglaries that were either "especially dangerous" or fit the common law definition. See *id.*, at 598. Instead, the Court adopted the "generic" modern definition of burglary "an unlawful or unprivileged entry into, or remaining in, a building or other structure with intent to commit a crime." *Ibid.*

The three strikes burglary is much more severe, being limited to residential burglaries, and requiring an intent to commit larceny or a felony. See *supra*, at 25, n. 5; Cal. Penal Code § 459. Residential burglary is a serious matter. It carries a real risk of danger and involves the violation of one's most personal space. It is thus very traumatic for the victims and can undermine police authority. California is justified in treating multiple prior convictions of this crime very severely.

Any doubt about Ewing's record is erased by his robbery conviction. See App. to Pet. for Cert. 24. California defines robbery traditionally, as the "taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force of fear." Cal. Penal Code § 211. Ewing's propensity for violence is further demonstrated by his battery and possession of a firearm and by the fact that two of his "strikes" "were violent and involved the use of a weapon." See App. to Pet. for Cert. 28. Ewing's extensive criminal record outside his strikes is also relevant to his sentence. California courts have the authority to avoid a three strikes enhancement by dismissing one or more of the prior "strikes" in the interest of justice. See *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P. 2d 429, 437 (1998). Since one's criminal record outside of the strikes would be relevant to this decision, it is also relevant to the Eighth Amendment analysis of any three strikes sentence.

Ewing is much more dangerous than Helm, and received a less severe sentence. While he received a potentially longer sentence than Rummel, Ewing is considerably more dangerous.

See *Rummel*, *supra*, 445 U. S., at 265-266 (*Rummel*'s nonviolent record). Given the strength of California's interest in incapacitating chronic offenders and Ewing's serious and violent record, his sentence was not grossly disproportionate to his culpability.

CONCLUSION

The decision of the California Court of Appeal for the Second Appellate District should be affirmed.

July, 2002

Respectfully submitted,

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01-6978

FOR ARGUMENT

No. 01-69787

Supreme Court, U.S.
FILED
AUG 1 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GARY ALBERT, EWING,

Petitioner-Appellee,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent-Appellant

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

BRIEF ON THE MERITS OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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QUESTIONS PRESENTED

1. Whether California's Three Strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a recidivist defendant whose criminal history includes four violent or serious prior felony convictions, and whose final strike conviction is for felonious grand theft?

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Supreme Court Rules

Rule 37.6 1

IDENTITY AND INTEREST OF AMICUS CURIAE

The California District Attorneys Association (CDAA) has **more than 2,400 prosecutors** in its membership. We present this amicus brief, pursuant to Supreme Court Rule 37, in support of Petitioners.[1] The elected District Attorneys of San Bernardino and Contra Costa Counties submit this amicus brief as the attorneys authorized to represent CDAA. We also have obtained and filed the parties' written consent to this brief.

CDAA has a strong interest in preserving California's **right to sentence recidivist offenders** in the manner which the California State Legislature and the California electorate have deemed appropriate. CDAA seeks to ensure that California retains its right to develop an **independent penological scheme**. As representatives of California's citizens, CDAA also has **a compelling interest** in guarding **against the erosion of the basic tenets of federalism**.

Finally, because CDAA is comprised of officers sworn by oath to protect the people of California from criminals, especially from incorrigible recidivists, we write in hopes that Gary Albert Ewing will be made to serve his *entire* sentence.

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[1] Pursuant to Rule 37.6, CDAA discloses that the Attorney General's Office copied and bound CDAA's amicus brief.

SUMMARY OF ARGUMENT

Appellant Gary Albert Ewing and *amicus curiae* in his support, Families Against Mandatory Minimums (FAMM), overemphasize the weight to be given the nature of the present offense in the threshold comparison of offender and sentence. They take their cues from footnote 21 in *Solem v. Helm*, 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983), which emphasizes the present crime to the detriment of the merely "relevant" criminal history. We believe that that formula was incorrect *then*, but has since been critically modified such that ***today* a recidivist's history weighs at least as much or more as his present crime**.

When Ewing's criminal history is given its proper weight during the threshold comparison, there can be no inference of gross disproportionality. Intrajurisdictional and interjurisdictional analyses are rendered unhelpful and unnecessary, and thus there is no Eighth Amendment violation. (Hence we present no comparative analysis in this brief. Besides, we suppose such comparison will have been already thoroughly briefed by the parties.)

We ask this Court: (1) to assign recidivist criminal history its proper weight in the threshold comparison of Eighth Amendment proportionality analysis, (2) to hold that because of Ewing's long and violent past that there is no inference of gross disproportionality of his sentence to his crime, and therefore, (3) to determine that appellant Ewing's sentence did not constitute cruel and unusual punishment.

I.
THERE IS NO INFERENCE OF GROSS DISPROPORTIONALITY. THEREFORE NEITHER INTRA- NOR INTERJURISDICTIONAL ANALYSIS IS REQUIRED.

Appellant Gary Albert Ewing has been busy committing crimes and sullying his adult criminal record since at least 1984, before six members of this Court joined it. **Sixteen years of crimes** have brought Ewing within the ambit of California's Three Strikes law, yet he has the temerity to insist that this Court focus primarily on his present crime.

Ewing's threshold comparison of the gravity of his crime to the severity of his sentence is flawed. He overemphasizes the nature of his present grand theft offense at the expense of his rotten criminal history. This myopia may not be entirely Ewing's fault. *Solem v. Helm*, 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983), upon which he heavily relies, led the way. But *Harmelin v. Michigan*, 501 U.S. 957, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991) changed the analysis. ***Today*, in the post-*Harmelin* world, an offender's recidivist history can properly weigh *as much or more* than the nature of his present offense or the severity of the corresponding sentence**.

When Ewing's history is given its proper weight in the threshold comparison, there can be no reasonable inference of gross disproportionality. Mr. Ewing now reaps no more than that which he has long been sowing.

A.

THE PRESENT OFFENSE AND THE SEVERITY OF THE SENTENCE ARE ONLY ONE *PART* OF THE THRESHOLD EQUATION. *CRIMINAL HISTORY* IS NO LESS IMPORTANT A FACTOR.

In *Solem v. Helm, supra*, 463 U.S. 277, a majority of the Court embraced the principle that the Eighth Amendment's ban of cruel and unusual punishments required that prison sentences for terms of years be proportional to their corresponding offenses. "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290.

The *Solem* Court's formula for proportionality review of prison sentences first "look[s] to the gravity of the offense and the harshness of the penalty." *Id.* at 290-291. Second, it "compare[s] the sentences imposed on other criminals in the same jurisdiction." *Id.* at 291. Third, it "compare[s] the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

Conspicuously absent from the *express portion* of three-part *Solem* formula is recidivist history. We think it should have been given a more prominent part in the equation, especially since *Solem* was a recidivist case. If the Eighth Amendment still permits more severe punishment of recidivists, then an offender's criminal history logically belongs ***within*** the first *Solem* prong, the comparison of the gravity of the offense to the sentence. That is not to say that the Court failed to take Helm's recidivism into account; it at least purported to do so. But it gave it very short shrift, and did so expressly. After characterizing

Helm's present felony as "passive" and relatively minor, the Court gave genuflected to the importance of recidivist history:

> Helm, of course, was not charged with simply uttering a "no account" check, but also with being a habitual offender. [n21] And a state is justified in punishing a recidivist more severely than it punishes a first offender. . .

Id. at 296, emphasis added. Nevertheless, the Court casually slipped into footnote 21 this key to its threshold analysis:

> **We must focus on the principal felony** — the felony that triggers the life sentence — since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

Id., emphasis added.

Where did this rule come from? How long has it existed? Where are the authorities upon which it rests? No cases are cited; no authority is given. Yet this "focus on the principal felony" myopically skews the entire proportionality formula.[2] Surely this

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[2] Such a focus also contradicts the holdings in *Rummel v. Estelle*, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980) and *Hutto v. Davis*, 454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 (1982), which thought that the present crime should **not** be overemphasized:

> Such analysis was implicitly rejected by **our**

explains much of why Mr. Helm dodged *his* life sentence, while Mr. Rummel was unable to dodge *his*.

If footnote 21 is a correct statement of the law, that even a *recidivist* record is merely "relevant" to *recidivist* sentencing decisions, then forests of convictions must go lightly regarded as sentencing courts stare only at the particular felonious tree before them. It comes as no surprise, then, that such overemphasis of present "minor" felonies should lead to inferences of gross disproportionality. This is precisely what happened in *Andrade v. Attorney General of California* 270 F.3d 743 (9th Cir. 2001) (cert. granted April 1, 2002, 2002 U.S. LEXIS 2158), where that court expressly embraced *Solem's* footnote 21. *Id.* at 759. But, like Bugs Bunny's wrong turn at Albuquerque, the *Solem* Court's "focus on the principal felony" predetermines the destination.

But we cannot believe that the Eighth Amendment to the United States Constitution makes the tip of an offender's iceberg of more concern than the ominous mass lurking below.

We suggest that *Solem* proportionality analysis was critically modified by *Harmelin v. Michigan, supra,* 501 U.S. 957 (1991), so that **recidivist history**

(..continued)

> **conclusion in *Rummel* that the " 'small' amount of money taken" was *inapposite*,** because to acknowledge that the State could have given Rummel a life sentence for stealing *some* amount of money "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts."

Hutto v. Davis, supra, at 373, emphasis added.

counts for *more* during the threshold comparison of offense and sentence. While it is true that *Harmelin* was not a recidivist case, it appears to have modified *Solem* nonetheless. According to the Fifth Circuit Court of Appeal in *McGruder v. Puckett* 954 F.2d 313 (5th Cir. 1992), cert. denied 506 U.S 849 (1992), a *Harmelin* "head-count" makes this apparent.

In the *Harmelin* decision, Justice Scalia and Chief Justice Rehnquist thought the Eighth Amendment included no proportionality requirement for terms-of-years sentences. *Harmelin, supra,* at 965. Justices White, Blackmun, Stevens and Marshall, dissenting from the judgment, continued to think that *Solem* properly set forth the law on proportionality. *Id.* at 1018, 1027-1028.

But Justices Kennedy, O'Connor and Souter discerned instead that the Eighth Amendment included only a "***narrow*** proportionality principle." *Id* at 997, (Kennedy, J., concurring in judgment), emphasis added. While the three justices agreed that this *narrow* proportionality principle applies to prison sentences for terms of years, they also taught that:

> The Eighth Amendment **does not require strict proportionality** between crime and sentence. Rather, **it forbids only extreme sentences that are "grossly disproportionate" to the crime**.

Id. at 1001, emphasis added.

This means that the second and third *Solem* factors,

> intrajurisdictional and interjurisdictional analyses are appropriate ***only* in the *rare* case** in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Id. at 1005, emphasis added.

The *Harmelin* split means that only four justices—a minority—continued to support the *mandatory* application of all three *Solem* factors. A majority did not. This can only mean that *Solem*, ***as understood*** by Justice White's group, is either dead or has been "eviscerated." [3]

We think that *Harmelin* changed more than the triggering mechanism for comparative analyses of the second and third *Solem* factors. **It also appears that in the post-*Harmelin* world, recidivism has assumed its rightful place in the first *Solem* factor**, the threshold comparison of offense to sentence.

In *McGruder v. Puckett* 954 F.2d 313, *supra*, petitioner McGruder had been convicted in Mississippi for auto burglary for stealing 20 cases of beer from a truck. *Id.* at 314. He was sentenced to life without possibility of parole under that state's habitual offender statute. He unsuccessfully appealed the denial of his federal petition for writ of habeas corpus, challenging his sentence as cruel and unusual on a theory of disproportionality under the Eighth Amendment.

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[3] Of course Justice Kennedy's group disagreed with that assessment, contending that that *their* understanding of *Solem* was proper, in light of *Rummel v. Estelle*, *supra*, 445 U.S. 263 (1980) and other precedent. *Harmelin* at 996-997, 1005.

After analyzing what *Harmelin* did to *Solem*, the *McGruder* court observed:

> **We think that [petitioner's disproportionality] argument ignores the essence of the statute under which he was sentenced**. Upon his conviction for auto burglary, he was sentenced under the habitual offender statute. Under that statute, his sentence is imposed to reflect the seriousness of his most recent offense, **not as it stands alone, but in the light of his prior offenses**. [Citation and footnote omitted.] We therefore review his sentence.

Id. at 316, emphasis added. The court then "turn[ed] to consider the gravity of McGruder's **offenses** in relation to the harshness of his sentence." *Id.*, emphasis added. In other words, the court considered the petitioner's **entire recidivist record** in its threshold *Solem* comparison—or now more accurately, *Harmelin* comparison. McGruder's previous crimes were not merely "relevant," to the analysis as *Solem* suggested in its footnote 21, but were now an essential and weighty part of the analysis.

McGruder's history included convictions for armed robbery, burglary, larceny, and escape. The court noted that two of the convictions were for crimes of violence *per se*. *Id.* at 314, 316. Predictably, the court held that as a matter of law there was no disproportionality at all, "much less *gross*[ ] disproportionality." *Id.* at 317, emphasis in original.

Importantly, the *McGruder* court engaged in **no comparative analysis whatsoever**. Perhaps more importantly, **the petitioner's present offense was *not* described by the court as serious, or violent**, or christened with some other magic label sufficient to avoid comparative intrajurisdictional and interjurisdictional analyses. In fact, the court said of the present auto burglary that it was a "concededly ***lesser offense*** than the earlier offenses." *Id.* at 317., emphasis added. Starkly contrary to *Solem's* footnote 21, the *McGruder* court actually **gave *greater* emphasis to McGruder's criminal history than it did his present offense**.

In *U.S. v. Brant*, 62 F.3d 367 (11th Cir. 1995), the Eleventh Circuit followed *McGruder's* reasoning in upholding against a cruel-and-unusual challenge a 15.66 year prison sentence for manufacturing marijuana where the defendant had prior state court convictions for growing marijuana with intent to distribute, selling marijuana, armed robbery, and escape. *Id.* at 367. The court considered Brant's criminal history along with the severity of the present offense when it rejected the need to engage in comparative analysis. *Id.* at 368.

The *McGruder* approach makes sense because it was a *recidivist* at bar, and it was his *recidivism* that got him there. Asserting that the present offense must be given more weight, while the recidivism remains merely "relevant" is nothing more than a means to divert attention from a rotten record.[4]

[4] Giving more weight to the present felony *in a recidivist case* than to the recidivist's record is also a tactic supported by many academics and some jurists as an ideological fig leaf, one too small to cover their visceral and subjective opposition to incapacitation as a penal philosophy.

California has not punished or incapacitated Ewing for stealing three golf clubs. We have done so for stealing them ***while having his criminal history.*** Ewing's prior convictions have made him a different, more guilty soul. As Justice Sneed explained about Andrade:

> While petty theft offenses are admittedly not grave, **Appellant's recidivist nature makes his current activity *much more* serious**.[5]

Andrade v. Attorney General, supra, 270 F.3d 743, at 771, emphasis added. (Sneed, J., dissenting.).

Thus there is grand theft—*and*—"much more serious grand theft." A spectrum of guilt necessarily must span the range between the two. Given a particular value of stolen property, the variable that *alone* accounts for that spectrum is criminal history. In other words, there is nothing meaningful *but* the criminal record to distinguish between the gravity of one offender's theft crime and another's. This principle is manifest in those, like Ewing, who sin so many times that they acquire "recidivist natures." These are the predators amongst us who have become predictably felonious—**and progressively more guilty with each new crime**, regardless of each crime's gravity in the abstract.

Logically, then, *a recidivist offender's*

[5] This is the startlingly simple rebuttal to *Brown v. Mayle's* insistence that "a general lawbreaking tendency" cannot constitutionally "justify Three Strikes' mandatory indeterminate life sentence for petty theft." 283 F.3d 1019, 1036 (9th Cir. 2002). Of *course* we do not punish "tendencies," but guilty *people*, and it is clear that some are guiltier than others, even for the same crime.

criminal record in *recidivist cases* goes way beyond "relevant" and ought to be the *paramount* consideration.

And where recidivist records are properly considered in California third strike cases, **the need for comparative analysis should be rare indeed**, because "third strikers" by definition will have committed at least two felonies from either the "serious" or "violent" felony lists, or both. (Cal. Pen. Code §667(b) through (i), and §1170.12.)[6] While it has been held that "no penalty is *per se* constitutional," (*Solem v. Helm, supra*, at 290), one sentenced to 25-years-to-life as Ewing was, will ***always*** have a worse criminal record than Rummel, (whose three minor crimes got him a life sentence) and Helm, *and*, arguably, Harmelin as well.) And parole is no distinction; Ewing *has* the possibility of parole as did Rummel.[7] True, Ewing has to wait twice as long, but his record is at least twice as bad. (*See discussion*, Section B, *infra*.) Besides, even *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002) acknowledged that "differences in age on release" cannot be "determinative." Eighth Amendment analysis "tak[es] into account ***only* those personal circumstances that may mitigate one's *culpability*** in committing the crime." [Citation.] *Id.* at 1028, emphasis added. Parole, obviously, has nothing to do with culpability.

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[6] "Serious" is in quotes for a reason. "Serious felony" is a term of art, meaning that a crime so deemed is listed in California Penal Code §1192.7(c). "Violent felony" is also a term of art, meaning that crimes so deemed are listed in California Penal Code §667.5(c). Many crimes are on both lists. "Violent felonies" all involve violence in the abstract. Almost all "serious felonies" do as well, although a few do not necessarily. That a crime is a "serious felony" does not preclude its being a "violent felony" or a *crime of violence*.

[7] The dissent in *Rummel* argued *against* considering the *possibility* of parole in proportionality analysis. *Rummel v. Estelle*, *supra*, at 294. Yet that same group plus one (Blackmun, J.), the *Solem* majority, thought it was perfectly proper to consider the *unlikelihood* of parole as a factor. *Solem v. Helm*, *supra*, at 297, 300-303. Given this inconsistency, the cynic might think that likelihood-of-parole is a factor to be marshaled only in the direction that might spring the prisoner. But this is digression because parole for Ewing is *not* foreclosed.

The need for comparative analysis was also rejected in *Hutto v. Weber*, 275 F.3d 682 (8th Cir. 2001), where the court upheld consecutive state prison sentences of 60 years for attempted escape plus 25 years for burglary, with possible parole eligibility in the year 2013 (assuming accrual of maximum "good time" credits). The District Court had **considered the facts behind Hutto's prior felony burglary and theft convictions** and determined that his criminal history was "essentially non-violent," and "not as serious as the appellees have attempted to portray it." *Id.* at 684. **The Court of Appeals shared the District Court's concerns** about Hutto's "relatively non-violent criminal history and minor role in the attempted escape. . ." *Id.* at 685. **Even so, following *Harmelin*, the court expressly rejected the need to engage in comparative analysis**, and agreed with the District Court that "Hutto's sentence is not disproportionate to his crime in the constitutional sense." *Id.*

In *U.S. v. Frisby*, 258 F.3d 46 (1st Cir. 2001), the court held that a 151-month repeat-offender sentence for a federal conviction for selling 0.8 grams of heroin was not grossly disproportional. The defendant had submitted comparative sentencing statistics, but the court rejected them, not only because they were inapposite (for failing to compare sentences for repeat offenders with the same from

other jurisdictions), but because there simply was no inference of gross disproportionality from the threshold comparison. This was because:

> Frisby was sentenced **as a career offender**, not simply as a drug dealer. **His sentence reflects a judgment not only about the severity of his controlled substance offenses, but also about the danger of his persistent recidivism**.

Id. at 50, emphasis added. Likewise, our Three Strikes law "reflects a judgment" about the danger of Ewing's persistent recidivism.[8]

And the Fourth Circuit Court of Appeals has gone so far as to hold "repeatedly" that "outside the context of a capital sentence **a proportionality review is necessary *only* with respect to sentences of life imprisonment without the possibility of parole**." *Beverati. v. Smith*, 120 F.3d 500, 504-505 (4th Cir. 1997), emphasis added, citing *U.S. v. Kratsas* 45 F.3d 63, 67 (4th Cir. 1995).[9] Other courts have held likewise. (*See, e.g., United States v. Organek*, 65 F.3d 60, 63 (6th Cir. 1995) ["This Court 'will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole.' "]; and *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990) ["However, because Meirovitz was sentenced to life without parole, we will engage in the rare review of the constitutionality of a district court sentence."]

But these post-*Harmelin* cases really present no *new* justification for the principle that a recidivist's record is *not subordinate* to the nature of the present offense. This had been understood, apparently, for two hundred years, and official doctrine for at least 90:

> The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct ***aggravates their guilt*** and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804. . .

Graham v. West Virginia, 224 U.S. 616, 623 (1912), emphasis added. So, it is not the "general criminal tendency," *per se*, but the *aggravated guilt* that dooms

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[8] California's judgment regarding recidivism was made resoundingly clear when its legislature overwhelmingly passed the Three Strikes statute and then again when Three Strikes initiative was embraced by more than 71% of the electorate on November 8, 1994. *People v. Ingram*, 40 Cal.App.4th 1397, 1416, 48 Cal.Rptr.2d 256 (1995). This law embraced the penal philosophies of greater retribution and incapacitation for our most persistent criminals (*id.* at 1415), and reflected the social values of Californians. *People v. Ayon*, 46 Cal.App.4th 385, 400, 53 Cal.Rptr.2d 853 (1996). Hence, the Court's deference to legislative authority "should be at its apex." *Andrade v. Attorney General, supra*, at 768 (Sneed, J., concurring and dissenting.)

[9] Ironically, it was the Fourth Circuit which the dissent in *Rummel v. Estelle, supra*, 445 U.S. 263 recognized as providing

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vanguard authority for the idea that the Eighth Amendment proscribed the disproportionality of prison sentences for terms-of-years. *See id.* at 305, dst. opn. Powell, J.

the habitual offender. Unfortunately, this simple—and constitutional—justification was lost in *Andrade* and especially *Brown*.[10]

But California has long understood this and has for decades examined offender history as a critical component of the threshold comparison in cruel and unusual analysis. In *People v. Cline*, 60 Cal.App.4th 1327, 71 Cal.Rptr.2d 41 (1998), for example, where 25-to-life under Three Strikes was imposed upon conviction for grand theft and commercial burglary, the court said it "(1) examines the "nature of the offense **and/or the offender**, **with *particular* regard to the degree of danger *both* present to society** . . ." *Id.* at 1337, citing *In re Lynch* , 8 Cal. 3d 410, 425 [105 Cal. Rptr. 217, 503 P.2d 921 (1972)], emphasis added. Only after this threshold comparison do California courts perform any comparative analysis. Under this formula, it becomes difficult for those in Ewing's shoes to conjure up *any* inference of gross disproportionality.

Respectfully, *amicus* asks this Court to rule that in habitual offender cases such as this, the offender's criminal history may be as important or more so in the threshold comparison of proportionality analysis.

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[10] The *Brown* court even thought that violent prior convictions were *completely irrelevant* to the Eighth Amendment threshold comparison where the present crime is nonviolent. *Brown v. Mayle*, *supra*, 283 F.3d at 1035. ["[t]he presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is nonviolent."] We think that this is an extreme view reflecting only the subjective disagreement of certain appellate justices with the penal philosophies implemented by the people of California.

B.
EWING'S RECORD.[11]

On March 12, 2000, Appellant Gary Albert Ewing walked into a golf pro shop and shoplifted three golf clubs worth $1,200. (*People v. Ewing*, No. B143745, slip op. at 2 (Cal. Ct. App. April 25, 2001.) He was observed by a witness, arrested by police, and charged as a "Three-Striker" with felonious grand theft[12] and second degree ("commercial") burglary.[13]

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[11] Appellant's status, like Helm's, "cannot be considered in the abstract" (*Solem v. Helm*, *supra*, 463 U.S. at 296, footnote 21), but the offender's record must be examined (as was Helm's), presumably *even when* it might *doom* a prisoner rather than spring him. In preparation for the present sentencing hearing, the court read "the prior [court] file", pertaining to the case where Ewing sustained his four strike convictions. (Los Angeles County Superior Court Case No. NA018343.) (See the court reporter's transcript of Ewing's sentencing hearing dated August 3, 2000. ["RT" hereafter.]). It is obvious that the present sentencing court derived from that file underlying factual information about the four strike crimes. (See RT p. 1505 [**court says it read the prior file**; and RT p. 1504 [court's discussion of specific facts, and defense counsel's discussion of Ewing's use of a knife as a weapon during two prior strike crimes].) The document in that file most likely containing renditions of facts would be the preliminary hearing transcript for the preliminary hearing held December 23, 1993. This is because trial transcripts are not normally kept in the trial court file, but preliminary transcripts are. Also, as some proof that the sentencing court relied on that 1993 preliminary hearing transcript, the court's specific comments regarding the female burglary victim who woke up to find Ewing in her home appear to have been derived from it. (Compare RT, p. 1504 with pp. 26-27 of the 1993 preliminary hearing transcript.) We therefore derive much of *our* factual understanding of Ewing's four strikes from the pertinent preliminary hearing transcript. We also understand that this transcript will have been lodged with the Court by the Attorney General.

[12] In California, theft is classified as "grand theft" when the value of the "money, labor, or real or personal property taken"

The jury found him guilty on the grand theft count, but acquitted him of the commercial burglary. On July 18, 2000, the trial court found true special allegations making Ewing a Three Strike offender punishable by 25-years-to-life in state prison. On August 3, 2000, the trial court imposed that sentence.

Ewing was approximately **38 years old** at the time of the present offense,[14] as well as at his subsequent trial, conviction, and sentencing. **Ewing has been on probation, parole, or incarcerated almost continuously since at least 1984**, when Ronald Reagan had yet to embark on his second presidential term.

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exceeds $400. California Penal Code §487(a). Qualifying conduct may be charged either as a felony or as a misdemeanor. See Penal Code §489(b) [providing for punishment "in a county jail not exceeding one year or in the state prison"], and see Penal Code §17(a) [designating crimes punishable in the state prison as felonies.] Of course, it falls to prosecutors whether to charge theft as grand (whether as a misdemeanor or a felony) or petty (always a misdemeanor unless there is a prior theft conviction). *See* California Government Code § 26500-26502; *and see People v. Ulibarri*, 232 Cal.App.2d 51, 55; 42 Cal.Rptr. 409 (1965) [disapproved on other grounds in *People v. Williams* 63 Cal.2d 452, 460, 47 Cal.Rptr. 7, 406 P.2d 647(1965)].

[13] "Every person who enters any . . . store . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary. . ." Penal Code §459. Entering a store with intent to steal is second degree burglary punishable by one year in county jail (the maximum allowable for a misdemeanor), or by 16 months, or two years or three years in the state prison. Penal Code §460(b) and §461.

[14] *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) held that "age is a relevant factor to consider in proportionality analysis. This is so because the ***first prong*** of the *Solem* test allows for courts to consider ***multiple factors*** relevant to ***culpability***... (*Id.* at 1284, emphasis added.) Surely 38 is old enough to know better, especially for a parolee as seasoned as Ewing.

A careful reading of the record reveals that Ewing was convicted of at least **13 crimes**[15] *before* committing his present final strike offense, including *at least* **five felonies**,[16] with **the remainder being misdemeanors**.

In November of 1984, Ewing committed grand theft in Ohio and sustained a conviction. The rest of his convictions of which we are aware occurred in California.

In November of 1988, Ewing was convicted of grand theft for stealing a car and was sentenced to three years probation with one year in Los Angeles County jail.

In September of 1990, Ewing was convicted for petty theft with a prior (Cal. Pen. Code §666), and was sentenced to three years probation—again—and ordered to spend 60 days in county jail.

In August of 1992, Ewing was convicted of misdemeanor battery (Cal. Pen. Code §242), and given two years probation and ordered to spend 30 days in county jail.

Also in August of 1992, Ewing was convicted separately convicted of theft—again. (Cal. Pen. Code

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[15] The presentencing probation report lists 10 separate occasions of conviction, but the final one pertains to four separate strike crimes committed on three separate occasions.

[16] In addition to the undisputed number of four strike priors, at least one other crime was a felony. (RT p. 1504:27-28 [defense counsel's comment that appellant had sustained a prior felony theft conviction] and p. 1507:28 [unrebutted comment by prosecutor that appellant had sustained five felonies].)

§484.) He was given a year probation and 10 days in jail.

In January of 1993, Ewing was arrested for burglary (Cal. Pen. Code §459) and obstruction of justice (Cal. Pen. Code §148.9 [false I.D. to peace officers.] He was convicted for violating the latter, given one year probation and 60 days in jail.

In February of 1993, Ewing was convicted for possession of drug paraphernalia (California Health and Safety Code §11364), granted three years probation and ordered to serve six months in county jail.

In September 1993, Ewing was convicted for appropriating lost property (Cal. Pen. Code §485) after having been charged with petty theft with a prior. (Cal. Pen. Code §666.) He received two years probation and 10 days in jail.

Also in September of 1993, in a separate case, Ewing was convicted of carrying a concealed firearm. (Cal. Pen. Code §12020(a).) This conviction looks suspiciously like armed burglary because it was charged with criminal trespass. (Cal. Pen. Code §602.5.) At any rate, it was a misdemeanor and he got one year probation and one month in county jail.

In late 1993, Ewing distinguished himself from Helm by becoming a serious and violent felon. On October 22, 1993, he burglarized the apartment of LaFaye Maddox, at night and while she was home in bed. She awoke to find Ewing still there. Ewing took some items of minor value and left his fingerprints on a wine glass. Ewing was convicted of this burglary as Count 4 in the 1993 information

On the afternoon of November 27, 1993, Lloyd Martinez returned home to his apartment to find that it had been burglarized. Keys to Martinez' garage and to the apartment security complex had been stolen. The keys were recovered from Ewing when police arrested him. Ewing was convicted of this burglary as Count 3 in the 1993 information.

Early the following morning, at approximately 3:00 a.m., apartment resident Steve Jordan was doing laundry in the laundry room when entered and accosted Jordan. Ewing told him he had a gun and demanded money. The man saw only a flashlight in Ewing's waist band and tried to shove him away. Ewing stood his ground and instead of going away, produced a knife with a six-inch blade, gained quick compliance by threatening his victim's life, robbed him of money and credit cards, forced the victim to provide access to his apartment, and fled. Ewing was convicted on this residential robbery and burglary as Counts 1 and 2 of the 1993 information.

For these four **violent and serious** crimes, Ewing was sentenced to nine years, eight months in state prison.[17]

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[17] We cannot help but doubt that *certiorari* would have been granted had California sentenced appellant to 25-years-to-life *then*, for *those crimes*. It is only after California law gave appellant a final chance to avoid incapacitation—a *bonus* for him—that our recidivist statute is called into question because it was triggered by felony thievery rather than something else. Is this not motivation for the People of California to eliminate the third strike requirement altogether and affix the 25-to-life sentence to an offender's *second* violent or serious felony strike? Such a sentence would surely be constitutional under *Solem's* present-felony priorities.

Ewing was on parole nine months when he committed his present grand theft of expensive golf clubs. And now he insists that the Eighth Amendment cares more how his present crime looks when set alongside his large sentence, than it does his past crimes. Hogwash.

The present crime is Ewing's sixth felony. We agree with the presentence probation report, which characterized the present crime as "serious," and Ewing as an obvious "threat to the community." There were five factors in aggravation and not a single one in mitigation.

C. ANALYSIS.

The only way to infer gross disproportionality here is to perform the threshold comparison while wearing those special glasses that shrink the present offense, magnify the sentence, and blind one to this offender's persistent and, at times, violent past. But that perspective is not the law.

1. Respondent's Felony Strikes Were Violent and Serious.

Respondent's "felony strikes" consisted of three convictions for first-degree residential burglary and one first-degree residential robbery at knifepoint. It should be undisputed that the robbery and associated burglary of Steve Jordan were both violent in the abstract by any objective standard. Additionally, both crimes were "serious felonies" (Cal. Pen. Code §1192.7(c)(18), and the robbery was a "violent felony." (Cal. Pen. Code §667.5(c)(9).)

Moreover, it is possible that the Jordan burglary and the Maddox burglary were "violent felony" strikes when he committed his present offense, for the simple reason that his victims were present while he burglarized them them. (Cal. Pen. Code §667.5(c)(21) [proscribing as a violent felony any residential burglary where it is charged and proved that the victim is present during the crime], passed by voter initiative Proposition 21, March 7, 2000, which took effect the following day, March 8, 2000.)[18]

This means that of Ewing's four strike crimes, all are "serious felonies," three are arguably "violent felonies," and two were unquestionably violent in the abstract. We think the Maddox burglary is also violent in the abstract. (Imagine the abject terror Ms. Maddox must have felt upon waking in the wee hours to find a strange intruder in her home.) However, even if a residential burglary does not ***actually* involve** violence, it has **great *potential* for violence**.

In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Court recognized that "**burglary is one of 'the most common violent street crimes**," and the character of a burglary "can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is

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[18] March 8, 2000 was also the new "freeze date" for the violent and serious felony strike lists. (California Penal Code §1170.125.) That means that "victim-at-home" burglaries can serve as prior "*violent*" as well as "serious" felony convictions when the third strike felony is committed after March 8, 2000. We cannot be sure here, however, about whether the Jordan and Maddox burglaries qualified, as no court has yet construed the "charged and proved" language in California Penal Code §667.5(c)(21).

still on the premises." 495 U.S. at 581, emphasis added; *see also id.* at 588. California sees residential burglary similarly. *See People v. Davis*, 18 Cal.4th 712, 720, 76 Cal.Rptr.2d 770 (1998) [explaining the gravity of residential burglary and its potential for violence]; *and see People v. Hines*, 210 Cal.App.3d 945, 950-951; 259 Cal.Rptr. 128 (1989) [explaining residential burglary's potential for violence.]

Ewing and *amicus* in his support fail to appreciate the violence of burglary, despite **numerous other statutory cues**. ***First***, there is no **plea-bargaining of "serious felony" charges**.[19] ***Second***, a defendant **may not be released without a hearing** and a finding of "unusual circumstances."[20] ***Third***, a prior conviction of a serious felony constitutes a **mandatory, non-strikeable five-year enhancement** to a current serious felony conviction.[21] ***Fourth***, a prior conviction of a serious felony **constitutes a "felony strike."**[22] ***Finally***, a serious felony conviction **may preclude probation or a suspended sentence** on a new felony conviction,[23] and **may make a defendant ineligible for drug treatment** for a current nonviolent drug possession offense.[24]

Length of sentence does not always tell the entire tale: these restrictions on burglary prosecutions reflect the legislative and electoral determination that the crime of residential burglary is one of the **most serious crimes** against the citizens of this state. To subordinate the consideration of Ewing's violent

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19 Cal. Pen. Code §§1192.7 (a) and (b).
20 Cal. Pen. Code §§1270.1, 1275(c).
21 Cal. Pen. Code §667 (a).
22 Cal. Pen. Code §§667(c), 1170.12(a).
23 Cal. Pen. Code §§1203.085(a)(b), 1203(k).
24 Cal. Pen. Code §1210.1(b)(1).

burglaries and robbery to his principal offense in the threshold comparison would be, in effect, to undermine California's many hard-won protections against burglars, robbers, and recidivists.

2. The Gravity of Ewing's Present Grand Theft Offense Should Not Be Downplayed.

Ewing committed *felony* grand theft. Grand theft has been part of the Cal. Pen. Code since 1872 and before. It is an "alternative felony crime" - one that is chargeable and punishable *either* as a felony or as a misdemeanor.[25]

An alternative felony crime or "wobbler" **charged as a felony remains a felony *unless*** a court imposes a misdemeanor sentence. *In re Anderson*, 69 Cal.2d 613, 664, fn.16, 73 Cal. Rptr. 21, 447 P.2d 117 (1968); *People v. Banks*, 53 Cal.2d 370, 381-382, 1 Cal. Rptr. 669, 348 P.2d 102 (1959); *People v. Bozigian*, 270 Cal.App.2d 373, 379, 75 Cal.Rptr. 876 (1969); *People v. Washington*, 243 Cal.App.2d 681, 687-688, 52 Cal.Rptr. 668 (1966).

A California sentencing court may reduce a "wobbler" to a misdemeanor even when the defendant has suffered prior "felony strike" convictions. *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 979, 60 Cal.Rptr.2d 93, 928 P.2d 1171 (1997). **If the court does not do so, the crime remains a felony**.

When such a felon has suffered prior convictions within the meaning of California's "Three Strikes" statutes, they must be proven or admitted. After the "felony strikes" have been proven or

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25 Cal. Pen. Code §17.

admitted, the trial judge still may dismiss them.[26] *People v. Superior Court (Romero)*, 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (1996). When the defendant has been found guilty of multiple current charges, the court may dismiss "felony strikes" as to one crime and may decline to dismiss them as to another current crime. *People v. Garcia*, 20 Cal.4th 490, 499-500, 85 Cal.Rptr.2d 280, 976 P.2d 831 (1999).

If a court does not dismiss *all* "felony strikes," a defendant's conviction becomes subject to the "Three Strikes" sentencing statutes. The "Three Strikes" statutes supplant the ordinary sentencing scheme for the underlying felonies. *People v. Dotson*, 16 Cal.4th 547, 556, 66 Cal.Rptr.2d 423, 941 P.2d 56 (1997); *People v. Superior Court (Romero)*, *supra*, at 524.

Thus, a defendant who is convicted of a **felony theft offense** and who has suffered at least two "felony strikes" **is not** punished ***simply*** for **felonious theft.** He is punished instead under the Three Strikes sentencing scheme, which mandates harsh punishment ***only*** for those with the qualifying prior convictions. In other words, he is **punished for his recidivism**. *People v. Lawrence*, 24 Cal.4th 219, 226-227 99 Cal.Rptr.2d. 570, (2000).

Ewing's present conviction is for felonious conduct, period. He has long behaved like a felon, has recently stolen property worth a felonious amount, and now he reaps the persistent felon's reward. The sentencing court declined to exercise its discretion to dismiss strikes or to reclassify the present crime as a misdemeanor. That should tell us something.

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[26] Cal. Pen. Code §1385

The seriousness of Ewing's crime is not measured alone by the value of the property he stole—$1,200 in golf clubs. Shoplifting causes annual losses to merchants estimated in the billions of dollars, forcing retail businesses to hire and maintain large security staffs to combat such pestilence, and to raise prices to compensate. In 2000, for example, one source indicates that United States retailers lost $32.3 billion to theft, 1.75% of their total sales, up from $29 billion the year before, which was 1.69% of total sales. Richard C. Hollinger, PhD & Jason L. Davis, 2001 National Retail Security Survey, (University of Florida 2001). Other sources have placed annual shoplifting losses at $7.2 billion. David A. Anderson, The Aggregate Burden of Crime, 42 J. Law & Econ. 611, 638 (Univ. Chi. 1999).

Moreover, shoplifting is a potentially violent crime because shoplifters who are detected frequently attempt to escape. Some escape attempts result in **violent confrontations** when the thieves use force or fear against store personnel or other citizens attempting to apprehend them.

When a thief in California uses force or fear to escape with merchandise taken in a commercial shoplift, **the thief is properly charged with robbery**. *See, e.g., People v. Estes*, 147 Cal.App.3d 23, 194 Cal.Rptr. 909 (1983). These robberies are punishable under Cal. Pen. Code §211 in the manner in which all unarmed robberies are punishable.

Confrontations between shoplifters and those trying to stop them **can escalate to deadly confrontations**. *See, e.g., People v. Weddle*, 1

Cal.App.4th 1190, 1198, fn. 9, 2 Cal.Rptr.2d 714 (1991).

This Court has recognized that a crime presenting **a threat of violence** is more serious than **a clearly nonviolent offense**. *Solem v. Helm, supra*, 463 U.S. 277, 293-294; ["nonviolent crimes are less serious than crimes marked by violence **or the threat of violence.**" [emphasis added]].

CONCLUSION

A careful reading of Ewing's record shows that up through 1993, he was becoming increasingly brazen and more violent with each new crime. We must not forget about his battery and firearm convictions that preceded the violent robbery and three burglaries. Only Ewing's nine years in state prison brought California temporary respite. The property, lives and limbs of potential victims may well have been preserved during that time. But only nine *months* after those nine years *parolee* Ewing again turned to his same old ways.

Ewing robs, threatens, burglarizes and steals with impunity, showing no remorse for these predations. He is predictably felonious because of his recidivist nature. His background is a trail of mud, his character is a patchwork of greed, sloth and obstinacy, and his prospects are an abyss. That Ewing has yet to shed blood moves no reasonable person to sympathy—bloodshed by him is surely a matter of time.

In short, Gary Albert Ewing is a bad man with a bad record. He now seeks to conceal that record to avoid his just sentence. We think success for him

depends almost entirely upon the weight given his recidivist record in the threshold comparison. Only if the Court focuses on Ewing's present felony as *Solem* prescribed, will he have a *chance* to join Helm in dodging a life sentence. But we have shown that *Harmelin* has changed things. A good many, if not most, jurisdictions avoid rushing headlong into comparative intra- and interjurisdictional analysis. They first look for an inference of gross disproportionality of crime to sentence. And contrary to *Solem*, these many courts do *not* overemphasize the principal felony in recidivist cases. They focus on the recidivist's record, sometimes primarily.

Put another way, since an effective criminal justice system must gauge an offender's guilt, cognizance ***must*** be taken of his criminal record. The law and common sense agree that the violent burglar who shoplifts is ***far more guilty*** for shoplifting than the hungry college student who is low on groceries.

When Ewing's record is given its *proper* place in the threshold comparison, **there can be no inference of gross disproportionality**. His record is **worse than Rummel's** in length, number of convictions, and gravity. It is **worse than Helm's** in the same three ways. And it is **worse than Harmelin's** even in gravity because of Ewing's six-inch knife.

Because icebergs run deep, only the foolish focus on their peaks. It is far wiser to worry about the great icy mass *under* the surface because that is where the danger lies. Surely the Eighth Amendment allows such consideration.

Respectfully submitted,

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